Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHURCH BY MAIL, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA;
LAWRENCE B. GIBBS, Commissioner of Internal Revenue,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the district court violated Church's due process rights in granting summary judgment for IRS denying Church tax-exempt status in light of the following issues:

   a. There are substantial disputes as to the material facts concerning the case.

   b. That the administrative record before the court is inadmissible.

2. Whether the court of appeals committed reversible error in sustaining summary judgment when the facts are in dispute.

3. Whether the district court decision violates Church's due process rights by judicially approving of administrative procedures by the IRS that violate Church's due process rights.

4. Whether the district court violated Church's First Amendment right to free exercise of religion by allowing the IRS to define and determine the existence of a church for tax exemption purposes.

5. Whether the district court has violated Church's due process rights by basing its adverse determination upon Church's potential for violation of the Internal Revenue Code instead of any actual violation of Internal Revenue Code.

6. Whether the Court of Appeals has violated Church's due process and First Amendment rights by affirming the decision of the district court.

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BASIS FOR JURISDICTION

1. November 27, 1989 is the date of the entry sought to be reviewed, the decision of the U.S. Court of Appeals.

2. The United States Court of Appeals for the District of Columbia Circuit Order denying Appellant's rehearing Petition for Rehearing is dated February 20, 1990.

3. Jurisdiction in the United States Supreme Court is based upon the following:

a. U.S. CONST. art. III, § 2 and 28 U.S.C. § 1254.

b. Review of a final decision of The United States Court of Appeals for the District of Columbia Circuit, Rule 10(1)(a), Rules of the Supreme Court of the United States, January 1, 1990.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution

U.S. CONST. art. III, § 2

Jurisdiction

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such

Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST. amend. I

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. V

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code

26 U.S.C. § 501(c)(3)

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Statutes

26 U.S.C. § 7428 (see appendix)

Declaratory judgments relating to status and classification of organizations under section 501(c)(3), etc.

28 U.S.C. § 1254 Courts of appeals; certiorari; appeal; certified question

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1331 Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332 (see appendix)

Diversity of citizenship; amount in controversy; costs

28 U.S.C. § 1346(e)

The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

Tax Court Rules

Rule 210(b)(11)

"Administrative record" includes the request for determination, all documents sub-

mitted to the Internal Revenue Service by the applicant in respect of the request for determination, all protests and related papers submitted to the Internal Revenue Service, all written correspondence between the Internal Revenue Service and the applicant in respect of the request for determination or such protests, all pertinent returns filed with the Internal Revenue Service, and the notice of determination by the Commissioner. In addition—

(ii) In the case of a determination relating to an exempt organization or a private foundation or a private operating foundation, the administrative record shall include the charter or articles of incorporation or association, or trust indenture or agreement, and any similar or related documents of the organization and any modifications thereof.

Rule 217(b)(1)

Disposition of Actions for Declaratory Judgment

(b) PROCEDURE: (1) *Disposition on the Administrative Record*: The Court expects that, within 30 days after service of the answer, the parties will file with the Court the entire administrative record (or so much thereof as either party may deem necessary for a complete disposition of the action for declaratory judgment), stipulated as to its genuineness. If, however, the parties are unable to file such a stipulated administrative record, then, not sooner than 30 days nor later than 45

> days after service of the answer, the Commissioner shall file with the Court the entire administrative record, as defined in Rule 210(b)(11), appropriately certified as to its genuineness by the Commissioner or by an official authorized to act for him in such situation. See Rule 212, as to the time and place for submission of the action to the Court. The Court will thereafter issue an opinion and declaratory judgment in the action. Except in a case involving a revocation or the status of a governmental obligation, the Court's decision will be based upon the assumption that the facts as represented in the administrative record as so stipulated or so certified are true and upon any additional facts as found by the Court if the Court deems that a trial is necessary. In the case of a revocation or a governmental obligation action, the Court may, upon the basis of the evidence presented, make findings of fact which differ from the administrative record. In the case of a governmental obligation action, see the last sentence of paragraph (1) of this Rule. See subparagraph (3) of this paragraph.

STATEMENT OF THE CASE

This Petition seeks a review of a decision of the United States Court of Appeals for the District of Columbia Circuit, affirming a decision of the United States District Court for the District of Columbia that granted Appellee's Motion for Summary Judgment and denied Appellant's Motion for Summary Judgment.

The facts material to the consideration of the questions presented may be summarized as follows:

In December of 1985, Church by Mail filed its application for recognition as a church and for exemption under Section 501(c)(3) of the Internal Revenue Code. The IRS submitted to the church a voluminous set of questions and requests for information and Church responded in detail to every question and request. Church fully met its burden of proof in its application and should have been granted tax-exempt status. On January 21, 1987, the IRS issued its final ruling denying Church's application. The examining agents refused to state their objections to Church's application; therefore, Church was unable to respond to the allegations of violations or otherwise make an effective defense to the allegations on the administrative level.

Church filed this action in the United States District Court for the District of Columbia alleging five causes of action briefly described as follows:

> *COUNT I.* Church alleges that the individual defendants wrongfully and intentionally relied on unconstitutional criteria in denying Church status as a church, in violation of IRS regulations as well as the establishment and free exercise clauses of the First Amendment to the United States Constitution.
>
> *COUNT II.* Church alleges that the individual defendants, in denying Church's application, violated Church's procedural due process rights under the U.S. Constitution and violated Internal Revenue procedures and guidelines by (a) using their bias and prejudice against Church's religion

in conducting the administrative process which was the basis for the development of the administrative record, (b) deliberately ignoring IRS procedures and deliberately misstating facts and obfuscating the administrative record, (c) deliberately refusing to clearly articulate the factual basis for their preliminary rulings (and communications to Church) for the purpose of confusing the administrative record and denying Church the opportunity to fully respond to issues concerning its application, (d) deliberately making a determination based on alleged facts known to be in error, and (e) using 14 criteria in determining Church's status as a church in violation of the procedural requirements for establishing rules within the Internal Revenue Service.

COUNT III. Church alleges that the denial of its application was based in part on prejudice and bias against its religion, including the fact that it relies almost exclusively on the mail for furthering its religious teachings, and that such unequal treatment amounts to a violation of Church's equal protection rights under the U.S. Constitution.

COUNT IV. Church alleges that the wrongful acts and omissions of individual defendants as alleged in counts I, II and III exceeded the bounds of the authority given to defendants under existing law, and were committed knowingly, willfully and intentionally in total disregard of clearly established law, including IRS rules, regulations and procedures.

COUNT V. Church alleges that the IRS adverse ruling should be reviewed and reversed pursuant

to declaratory judgment under 26 U.S.C. § 7428. Under this count, Church incorporated all of the allegations of the complaint including the allegations regarding violation of procedural due process and specifically sought an order directing the Commissioner of Internal Revenue to specifically state the factual and legal basis for the denial of Church's application so that Church could present evidence, if needed, so that all factual and legal issues could be properly framed and addressed. Church also sought a declaration that the 14 criteria used to determine whether Church is a church are unconstitutional.

In addition to the final order granting defendants' Motion for Summary Judgment and dismissing the case, the district court below issued several other orders during these proceedings from which appeal was taken. Each of those orders is briefly described below.

1. *Order dated June 29, 1987 granting defendants' motion for protective order.* By this order, the court denied Church's request for discovery of, among other things, the specific reasons and supporting facts for each point raised in defendants' final ruling denying Church's exemption. The discovery request was primarily directed at clarifying the IRS' position and affording Church an opportunity to fully respond so that the procedural flaws in the administrative process could be corrected.

2. *Order dated October 30, 1987, denying Church's motion for order directing the United States to file findings of fact and supporting law.* By this order, the court denied Church's second

attempt to precisely identify the issues raised by defendants' final ruling.

3. *Order dated October 30, 1987, granting defendants' Motion for Leave to File the Administrative Record.* By this order, the court overruled Church's objections to the filing of the administrative record without first removing the irrelevant and prejudicial material accumulated in the record as a result of the defendants' unfettered control of the administrative process and the misuse of the process as alleged in Church's complaint.

4. *Order (effectively made as a result of order dated March 29, 1988) denying Church's Motion to Exclude Portions of the Administrative Record.* The court's denial of this motion prohibited Church from raising at an early stage of the proceedings its objections to consideration of certain evidence in the administrative record. Although the court stated on the record that it would afford Church an opportunity to object to evidence at the time the matter was heard, the court has never explicitly addressed Church's evidentiary objections and has in fact considered matters in the record which should have been excluded from consideration.

5. *Order dated September 19, 1988, denying Church's Motion to Restore the Administrative Record, to Expunge Documents from the Administrative Record and for Sanctions.* By this order, the court denied Church's attempt to restore the administrative record to the condition and order in which it was originally submitted to the Internal Revenue Service. The court eventually ex-

punged the four documents which Church urged to be expunged by this motion, but did not permit restoration of the administrative record.

6. *Order dated January 22, 1988, granting defendants' motion to dismiss counts I, II, III, and IV of the complaint.* By this order, the court dismissed counts I, II, III, and IV of Church's original complaint. Counts I, II, and III were dismissed on the grounds that "courts will not create a *Bivens*-type damages remedy for alleged constitutional violations when 'Congress has created explicit remedies or when a court created remedy would interfere with the effective functioning of the government'." Count IV was dismissed on the grounds of absolute immunity of the individual defendants.

7. *Order dated March 10, 1988, denying Church's motion to reconsider and amending the court's memorandum filed on January 22, 1988.* This order was a modification of the January 22, 1988 order listed above after the decision of the United States Supreme Court in *Westfall v. Erwin*, 484 U.S. 292, 98 L.Ed.2d 619, 108 S.Ct. 580 (1988). The amendment to the order related to the dismissal of count IV of Church's complaint. The court added to its order a finding as follows: "nor does plaintiff allege that the defendants were not exercising substantial discretion in the performance of their quasi-adjudicative function of reviewing applications for tax exemption".

8. *Order dated March 29, 1988, continuing the protective order filed June 30, 1987, and ordering that plaintiff file and serve an amended complaint*

for declaratory judgment pursuant to Tax Court Rule 211(f) and otherwise setting forth a procedure for hearing the declaratory judgment action including the filing of motions for summary judgment. By this order, the court, having dismissed counts I, II, III, and IV of Church's complaint, adopted in part the rules of the Tax Court with respect to this case. Church was required, over its objections, to file a new complaint pursuant to Tax Court Rules governing cases under 26 U.S.C. § 7428. Both parties were ordered to file simultaneous motions for summary judgment after an answer was filed.

9. *Order dated September 19, 1988, denying Church's motion to strike.* By this order, the court denied Church's motion to strike portions of defendants' answer to the new complaint which answers failed to either admit or deny the allegations of the complaint as required by the Tax Court Rules.

The parties filed motions for summary judgment simultaneously pursuant to the court's order. Plaintiff filed with its Motion a 59-item Statement of Material Facts. The IRS filed with its Motion a 60-item Statement of Material Facts. Church disputed and controverted 31 of the government's 60 alleged material facts in Plaintiff's Response in Opposition to the United States' Statement of Material Facts. On November 28, 1988, the court issued its order denying Church's Motion for Summary Judgment, granting defendants' Motion for Summary Judgment, and dismissing the complaint.

Church filed a motion to reconsider that order, as well as the other orders listed above which prior to

that time were interlocutory. Church's motion to reconsider was denied on February 8, 1989.

Church filed a notice of appeal on March 10, 1989. The court of appeals affirmed the district court on November 27, 1989. Church then filed its petition for rehearing, which was denied on February 20, 1990. Church now respectfully seeks this review.

Pursuant to Rule 14(i) of the Supreme Court Rules, the basis for jurisdiction in the court of first instance, the U.S. District Court for the District of Columbia, was based upon the following:

1. Civil action arising under the Constitution of the United States, 28 U.S.C. § 1331.

2. Diversity of citizenship, 28 U.S.C. § 1332.

3. Civil action for declaratory judgment against the United States as provided in § 7428 of the Internal Revenue Code pursuant to 28 U.S.C. § 1346(e).

ARGUMENT

The appellate court's refusal to remand this case to the district court for trial constitutes a violation of Petitioner's Fifth Amendment due process rights. Petitioner is entitled to a trial because the summary judgment that was granted and affirmed is a fundamental error. There are substantial disputes between the parties concerning material facts alleged by the parties and those facts which are not in dispute do not form a sufficient basis for denial of tax-exempt status. The content of the administrative record as presented to the court is also disputed by Petitioner and has never been certified by Respondent. These issues preclude the application of summary judgment

by the district court and require a trial be held to determine the facts and the Church's entitlement to tax-exempt status. The appellate court, in its affirmation of the district court's ruling, denies Petitioner the right to trial to which it is entitled. The appellate court's affirmation, therefore, constitutes a violation of Petitioner's due process rights.

The record before the appellate court demonstrated a significant dispute between the parties as to the material facts of the case. The district court, in its memoranda, admitted to the existence of these disputed facts stating: "The United States has filed a 60-item Statement of Material Facts, only seven of which are in dispute by Plaintiff. (A copy of Respondent's 60-item Statement of Material Facts is attached as Exhibit "A".) The court granted summary judgment for defendant despite the court's admitting to the existence of disputed material facts. The court's error is more pronounced in that Petitioner had filed "Plaintiff's Response in Opposition to the United States' Statement of Material Facts" (a copy is attached as Exhibit "B") in which Petitioner contested not seven, as stated by the court, but 31 of the 60 alleged facts. The existence of these 31 disputed facts precludes the granting of summary judgment, therefore, the district court's order was in error.

The standard for review for summary judgment dictates that if there are issues of material fact in dispute, a case must be remanded for trial. The United States Supreme Court, addressing material fact issues in *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180, 186 (1962), stated "allegations which in some circumstances might have a bearing on the subject were controverted and therefore can only be re-

solved by a trial on the merits." The U.S. Court of Appeals for the District of Columbia Circuit stated in *Weiss v. Kay Jewelry Stores, Inc.*, 470 F.2d 1259 (D.C. Cir. 1972), "once it is determined that material facts are in dispute, 'summary judgment may not be granted'." The existence of a disputed material fact precludes entry of summary judgment and requires a trial on the merits. In this case, the district court admitted that there are seven, and in fact there are 31, disputed facts. The presence of the 31 disputed facts requires the court of appeals to remand the case for trial to determine the issues. The court of appeals affirmed the judgment, denying Petitioner its right to a trial, and denying Petitioner its due process rights.

The district court, without authority, imposed upon the proceedings Tax Court Rules and then failed to follow those rules. Both of these actions are a denial of Church's due process rights. Tax Court Rule 210(b)(11) requires that the administrative record before the court be certified by the Commissioner or stipulated to by the parties. Tax Court Rule 217 further provides that if the record is not stipulated to by the parties, it must be appropriately certified as to its genuineness by the Commissioner. The administrative record presented to the district court was scrambled, substantial document exhibits had been removed and attached to other exhibits. The scrambled record was neither stipulated to by the parties nor certified by the Commissioner. The district court was made aware that Petitioner disputed the content of the record by appropriate motions filed by the Petitioner. The district court denied Petitioner's Motion to Restore the Record to its original, unscram-

bled state. The record before the district court was therefore erroneous, not factual, and in dispute.

Where there is a dispute as to the content of the administrative record, there must be a trial to determine the facts, the truth, and admissibility of the record. At trial, where Petitioner would sustain its burden of proof and Respondents would attempt to overcome Petitioner's case as presented, both sides would be limited to facts contained in the record, and the admissibility of those facts would be governed by the rules of evidence. The IRS, at trial, would not be able to make their case with created inadmissible facts or evidence. That trial was denied by the district court. The appellate court, in affirming the summary judgment, further denied Petitioner the right to a trial to which it was entitled; a trial necessary to determine the admissible facts in the administrative record.

Church by Mail has been further denied its due process rights by misuse of administrative procedure by the Internal Revenue Service. Petitioner was required by the IRS to answer a multitude of questions above and beyond the requirements of Form 1023. Petitioner had met its burden and was entitled to tax exemption based upon its 1023 application. Most of these questions would not have been permitted into evidence at trial. The questions had nothing to do with Petitioner's right to exemption and cover events prior to the date sought for exemption. Petitioner was not allowed to refuse to answer any of these questions; the penalty for refusal to answer is immediate denial of tax exemption. The IRS conducts the administrative procedure and makes its determination in a manner that would constitute a violation of

Petitioner's due process rights at trial. Such practices are a violation of due process at the administrative level.

Respondents' procedure denies Petitioner its due process rights by failing to allow Petitioner to make any defense to any determinative questions. Not only has the IRS made its determination upon inappropriate and inadmissible questions, but Respondent has not, and will not, inform Petitioner as to what questions and answers it has based its determination of denial of tax exemption upon. Respondent is not required procedurally to inform Petitioner as to what questions and answers it relied upon. Petitioner is therefore denied any opportunity to admit any evidence to counter the allegations, or to explain any facts that might be misconstrued, or otherwise form a defense because it has been denied information as to what the determinative questions and answers were. Procedure that allows such wide latitude for examination while denying any defense to that examination would be a violation of due process at trial; therefore it is a denial of due process at the administrative level.

The court of appeals' affirmation of the district court's summary judgment violates Church's First Amendment rights. The IRS would make a determination of Church's tax-exempt status based upon 14 criteria as to what defines a church. These characteristics the IRS relies upon are: (1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code or doctrine in discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) a

complete organization of ordained ministers ministering to their congregation; (8) ordained ministers selected after completing prescribed courses of study; (9) a literature of its own; (10) established place of worship; (11) regular congregations; (12) regular religious services; (13) Sunday school for religious instruction of the young; (14) school for the preparation of its ministers. By applying these 14 criteria to determine tax exemption, the IRS is defining what a church is, and such an act is prohibited by the First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibition of free exercise thereof. First Amendment to the United States Constitution.

These 14 criteria are not part of the IRS's administrative rules, but they are applied as if they were. The IRS used the criteria to establish that Church is not a church because it did not meet some of the criteria. Denial of tax exemption further restricts Church from free exercise of religion by making its religion more expensive to practice than exempted religions. Church's First Amendment rights are further violated by the district and appellate courts' rulings upholding the IRS's unconstitutional determination, essentially allowing the IRS to circumvent Church's First Amendment Rights.

The district court, and the appellate court in upholding the district court's decision, has violated Church's due process rights (which in turn violates Church's First Amendment rights) by punishing Church for a wrong it has not committed. In the district court's Memoranda of November 28, 1988,

and in its Order of February 8, 1989, the court found "[e]ven if actual payment of compensation were not inurement. . ., there would be inurement here because the control exercised by Reverend Ewing and McElrath. . .creates a potential for abuse." If there is inurement, the IRS may legally revoke tax exemption pursuant to Section 501(c)(3), but there has been no inurement in this case, as is admitted by the district court. No law allows for denial of exemption based upon a potential for abuse. If there were such a law it would be unconstitutional. Such a legal precedent created by the IRS and judicial fiat would abridge the privileges and rights of all citizens by holding them accountable for wrongs they had not committed. Application of such a principle abridges the rights of Church, by holding Church responsible for an act that has not occurred, punishing Church for a wrong it did not commit.

Petitioner, Church by Mail, has been denied its Fifth Amendment rights by the Internal Revenue Service, the district court, and the court of appeals. The denial of Church's due process rights has in turn been used to deny Church it rights under the First Amendment. Denial of Church's right to a trial allows the IRS to dictate the establishment of only those religions it condones, and allows the IRS to freely restrict the exercise of any religion it chooses. Plaintiff respectfully requests it be granted its right to a trial, so that it may prove its total compliance with the law, establish its right to tax-exempt status, and be allowed to exercise its rights under the First Amendment.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-0754-LFO

CHURCH BY MAIL, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

FILED

NOV 28 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

For reasons stated in the accompanying Memorandum, it is this 28th day of November, 1988 hereby

ORDERED: that plaintiff's motion for summary judgment shall be, and is hereby, denied; and it is further

ORDERED: that defendants' motion for summary judgment shall be, and is hereby, granted; and it is further

ORDERED: that the complaint in this case shall be, and is hereby, dismissed.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-0754-LFO

CHURCH BY MAIL, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

FILED

NOV 28 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM

Church By Mail ("CBM"), an Oklahoma not-for-profit corporation, communicates with its public by mail, sending materials and receiving contributions. The CBM mailings consist primarily of various religious messages, usually accompanied by requests for money. On December 10, 1985, CBM filed an Application for Recognition of Exemption under Code Section 501(c)(3) of the Internal Revenue Code. On January 21, 1987, the Internal Revenue Service ("IRS") denied the application. The matter is now before this Court on the motion of CBM for a summary judgment that it qualifies for exemption under IRS Section 501(c)(3), and the motion of the government for a summary judgment that the IRS correctly denied the CBM application.

The IRS had denied an earlier application by CBM, filed in January of 1980. CBM's petition to the Tax Court chal-

lenging the denial was not successful, *Church By Mail, Inc. v. Commissioner*, 48 TCM 471 (1984), and the Court of Appeals for the Ninth Circuit affirmed the Tax Court, *Church By Mail, Inc. v. Commissioner of Internal Revenue*, 765 F.2d 1387 (1985).

The United States has filed a 60-item Statement of Material Facts, only seven of which are disputed by plaintiff. The undisputed material facts are incorporated herein by reference. The material highlights are as follows:

Reverends James Ewing, Milton R. McElrath, and Donald R. Luce constitute the board of Trustees and principal officers of CBM which they founded together with O. Duane Snyder. Reverends Ewing and McElrath are the sole shareholders of Twentieth Century Advertising Agency, Inc. ("Advertising") and control Church and Bible Study in the Home By Mail ("CBSHM"). These three organizations share space and employees. In 1985 the controlling owners/officers of these three entities realized from them the following salaries:

	COMBINED	*CBM*	*CBSHM*	*Advertising*
Rev. Ewing	$345,379	$69,000	$17,250	$259,129
Rev. McElrath	$341,635	$66,020	$16,505	$259,130
Rev. Luce & his family combined	$161,514.77	$95,442.18	$55,872.59	$10,200
O.D. Snyder & his family combined	$131,265.43	$131,265.43		

Thus, in 1985, Advertising paid $528,459 in salaries to Reverends Ewing and McElrath, and Reverend Luce and his family.

In 1985, CBM paid Advertising $3,108,003.40 in irregular amounts for alleged out-of-pocket expenses. In addition, CBM acknowledged an obligation to Advertising in the amount of $2,303,056.49 with no due date but bearing interest—originally the rate of interest was 15 percent. It

has since been restated to be the variable rate charged by the IRS on unpaid tax liabilities and tax refunds.

It is apparently undisputed that in 1985 CBM collected from its mailees and others $7,245,231, claimed to have incurred $5,708,326 in expenses (paid primarily to Advertising), paid $325,909 to officers and contributed $628 to charities. Reverends Ewing and McElrath have personally guaranteed in excess of $1,000,000 of CBM's debts.

CBM has no congregation in the sense of a regular gathering of worshipers. It has no established places for services. It conducts no regular services. It has no defined ecclesiastical government. It offers no schools, training or instructions.

The Tax Court found, in an extensive detailed analysis, that (1) CBM was not operated exclusively for charitable purposes, but was operated substantially for the financial benefit of Reverends Ewing, McElrath, their families and close associates, and (2) CBM's net income inures to their private benefit. *Church By Mail, Inc. v. Commissioner*, 48 TCM 471 (1984). The Court of Appeals for the Ninth Circuit affirmed the Tax Court. *Church By Mail, Inc. v. Commissioner of Internal Revenue*, 765 F.2d 1387 (1985). CBM chose thereafter to attempt to change its *modus operandi* by cancelling the service contract with Advertising, which the Tax Court and the Ninth Circuit identified as the funnel by which public contributions flowed into the hands of the benefitting individuals. But instead of returning to the Tax Court and the Ninth Circuit, CBM selected a new forum—this Court. However, its burden is the same here as it would have been in the Tax Court and the Court of Appeals. The point of departure is an affirmed Tax Court finding of fact and conclusion of law that CBM is not a charitable organization and that some part of its net earnings inure to the private benefit of those individuals who manifestly control it.

Suffice it to say here that the Tax Court and the Ninth Circuit found inurement from the fact that the compensation realized by Reverends Ewing and McElrath from CBM and Advertising during the years then in question are as follows:

1978	None
1979	$21,200 (from May)
1980	$269,694.22
1981	$318,300 (through August)

The undisputed fact is that in 1985, the year before CBM filed the application at issue here, Reverend Ewing received $345,379 and Reverend McElrath received $341,635. It is obvious that even if the CBM/Advertising contract does not exist as of 1985, there were other funnels (e.g. through CBSHM and by operation of the open account between CBM and Advertising) for an ample flow of funds for the benefit of, and inuring to, the controlling individuals. CBM has made no showing that the compensation paid to the principals here is in any way commensurate to services rendered to achieve charitable purposes. *See Bubbling Well Church of Universal Love, Inc. v. Commissioner*, 670 F.2d 104 (9th Cir. 1981). Moreover, there is no showing to contradict the reasonable inference that these amounts received by the controlling interests derive directly or indirectly from the public's contributions to CBM, routed partly as salaries from CBM and CBSHM and partly through the labyrinth of the loan, open account and interest arrangement between CBM and Advertising.

CBM seeks to demonstrate that such compensation is not excessive when compared to that realized by executives in the private sector. But the benchmark has been established here by the Tax Court and the Ninth Circuit. As the latter court has stated:

> There is evidence in the record supporting the tax court's finding that the combined salaries paid to Reverend Ewing and Reverend McElrath and

their families by the Church and Twentieth were excessive. The ministers are responsible for drafting the sermons, conducting church services in various cities and handling the financial commitments of the Church, including the contractual arrangements with Twentieth. The ministers spend only 60% of their time working for the Church and Twentieth. As set forth above, for the first eight months of 1981 both ministers received income from the Church and Twentieth in excess of $160,000. During the same year, Brenda Ewing received $8,550 from the Church while Paul Ewing and Ray McElrath each received $30,000 from Twentieth. Other courts have considered salaries far less than these unreasonable, particularly where the clergy have control over the Church's financial affairs. *See Bubbling Well Church of Universal Love v. Commissione*, 670 F.2d at 105 (combination of $13,648 parsonage allowance, $19,468 minister's living allowance and $3,924 paid to three family members who were church's sole employees and voting directors was excessive); *Founding Church of Scientology v. United States*, 412 F.2d 1197, 1200-02, 188 Ct.Cl. 490 (1969), *cert. denied*, 397 U.S. 1009, 90 S.Ct. 1237, 25 L.Ed.2d 422 (1979) (salary unreasonable where minister received over $108,000 from the church during four-year period, as well as the use of a business automobile and the payment of benefits to the minister's wife and children.) *See also Church of the Transfiguring Spirit, Inc. v. Commissioner*, 76 T.C. 1, 4-6 (1981) (inurement of private benefit to minister who had control over church and received housing allowance of $2,400 in 1979 and $2,640 in 1980); *Unitary Mission Church v. Commissioner*, 74 T.C. 507, 513-15 (1980) (inurement of private benefit where

> minister received yearly parsonage allowances ranging from $12,000 to $35,650 and controlled church's financial decisions).
>
> Moreover, we believe that services comparable to those performed by the ministers could be obtained from an outside source in an arm's length transaction at a more reasonable cost. *See B.H.W. Anesthesia Foundation, Inc. v. Commissioner*, 72 T.C. 681, 686 (1979) (court should consider all facts and circumstances surrounding petitioner's operations in determining whether comparable services would cost as much if obtained from an outside source in an arm's length transaction.) It seems likely that a member of the clergy could be hired to perform the part-time duties for which the ministers are responsible at a salary of considerably less than $160,000 per year.

Church By Mail, Inc., supra, 765 F.2d at 1392-93. Applying that standard to the compensation reported here, this court finds that the compensation paid to Reverends Ewing and McElrath is manifestly excessive, benefits those with controlling interests in the allegedly charitable organization, and inures to their benefit.

It may be difficult for the IRS and for the court to precisely trace the flow of funds from source to destination. But necessity for such precision is obviated by principles developed by the Tax Court and the Court of Appeals. Even if actual payment of manifestly excessive compensation were not inurement because the complex accounting makes precise tracing difficult without the services of an IRS Special Agent, there would be inurement here because the control exercised by Reverends Ewing and McElrath over all three related entities creates a "potential for abuse." *Bubbling Well Church of Universal Love, Inc., supra*, 670 F.2d at 105. As the Ninth Circuit observed, looking back at its decision about CBM, "excessive

compensation and potential for abuse, even absent a showing of actual abuse, will constitute inurement." *See Church of Scientology of California v. Commissioner of Internal Revenue*, 823 F.2d 1310, 1317 (9th Cir. 1987).

The Tax Court and the Ninth Circuit concluded that CBM had failed to establish that no part of its earnings inures to the benefit of any private shareholder and that it was operated for an exclusively charitable purpose. Undisputed facts demonstrate that, despite termination of the contract with Advertising, these essential conclusions apply to the application here at issue.

In reaching this conclusion, the court has not overlooked plaintiff's claim that denial of CBM's exemption violates rights guaranteed to it by the establishment clause of the First Amendment. But tax exemption is a creation of Congress. CBM makes no plausible claim that it is treated for tax exemption purposes differently than any other similarly situated religious organization. *See Gillette v. United States*, 401 U.S. 437, 452 (1971). There is no constitutional right to a tax exemption for CBM.

Accordingly, an accompanying order will deny plaintiff's motion for summary judgment, grant defendants' motion for summary judgment, and dismiss the complaint.

Date. November 28, 1988 /s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 87-0754-LFO

CHURCH BY MAIL, INC.

Plaintiff,

vs.

UNITED STATES OF AMERICA; LAWRENCE B. GIBBS, Commissioner of Internal Revenue; PETER K. BROS; WILLIAM W. MILLER, JR.; MILTON CERNY; DAVID DAUME; JOHN F. KELLY; and unknown agents of the Internal Revenue Service,

Defendants.

FILED

OCT 23 1989

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

Upon consideration of Plaintiff's Motion to Change Local Counsel, it is hereby

ORDERED that David N. Webster's motion to withdraw as local counsel is hereby granted and it is

FURTHER ORDERED that James P. Davenport, Esq., Nussbaum & Wald, Suite 200, One Thomas Circle, N.W., Washington, D.C. 20005 is hereby added as new local counsel.

/s/ Louis F. Oberdorfer
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988

No. 89-5068

Civil Action No. 87-00754

Church by Mail, Inc.,
a non-profit Oklahoma Corporation,

Appellant

v.

United States of America, *et al.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED AUG 24 1989
CONSTANCE L. DUPRÉ
CLERK

ORDER

Upon consideration of appellees' motion to extend time to file brief and for leave to file motion out of time and it being represented that the motion is unopposed, it is

ORDERED that the aforesaid motion is granted. The following briefing schedule shall now apply:

Appellees' brief	—	August 28, 1989
Appellant's reply brief, if any	—	September 11, 1989
Deferred Appendix	—	September 18, 1989
Final briefs of all parties	—	September 25, 1989.

For the Court:
Constance L. Dupre, Clerk

By: /s/ Teresa L. Johnson
Teresa L. Johnson
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988

No. 89-5068
CA 87-00754

Church By Mail, Inc.,

Appellant

v.

United States of America, *et al.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED JUN 14 1989

CONSTANCE L. DUPRÉ
CLERK

ORDER

It appearing that the above case may fall within the intent and purpose of Rule 13(i) of the General Rules of this Court and may also meet one or more of the criteria set forth in that rule, it is

ORDERED, *sua sponte*, that a briefing schedule be established as follows:

Appellant(s) Brief and Appendix	July 24, 1989,
Appellee(s) Brief	August 23, 1989,
Appellant(s) Reply Brief, if any	September 6, 1989
Deferred Appendix	September 13, 1989
Final Briefs of All Parties	September 20, 1989

This notice does not preclude the court, after examination of the briefs, from setting this case for oral argument. If this case is accorded 13(i) treatment, an order will be issued disclosing the panel prior to decision on the merits of the case.

All parties should include the following phrase on any pleading or brief hereinafter filed in this case: "CASE BEING CONSIDERED FOR TREATMENT PURSUANT TO RULE 13(i) OF THE GENERAL RULES".

For the Court:
CONSTANCE L. DUPRE, CLERK

/s/ Teresa L. Johnson
By: Teresa L. Johnson
Deputy Clerk

ORDER 86-11
(8/87; rev.12/88)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988

No. 89-5068

CA No. 87-00754

Church By Mail, Inc., a non-profit
Oklahoma corporation,

Appellant

v.

United States of America, *et al.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED MAR 27 1989

CONSTANCE L. DUPRÉ
CLERK

ORDER

It appearing that this new case has been filed and docketed, it is

ORDERED that the parties shall submit the following documents (original and one copy, unless otherwise noted) on or before 4/26/89:

1. Appellant(s) Docketing Statement
2. Appearance Forms from each party
3. Submission by appellant of Copy of the Decision of the District Court

4. Appellant(s) Statement of the Issues to be Raised on Appeal
5. A Certificate of Counsel (Gen.R. 11(a)(1)) from each party
6. A Report from appellant certifying that all necessary transcripts, if any, have been ordered, including the date when the transcript was ordered and a statement that satisfactory financial arrangements have been made with the Reporter. A copy of the Report shall be served on each Reporter.
7. Procedural motions from any party which would affect the calendaring of the case. (original and four copies and such motions should not be attached to other filings)
8. Statement from appellant as to whether the parties will utilize a deferred appendix under F.R.A.P. 30(c). (A motion will not be necessary)

It is FURTHER ORDERED that the parties shall file dispositive motions, if any, on or before 5/11/89. *See* Gen.R. (7)(i). (Original and four copies) The filing of the record on appeal and briefing are deferred pending further order.

It is FURTHER ORDERED that appellant shall file and serve a Status Report Concerning Transcripts every 30 days until receipt of all transcripts ordered. Within three (3) days of receipt of all transcripts, Appellant shall file a Final Status Report Concerning Transcripts. All reports shall be served on the parties and each Reporter.

For the Court:
Constance L. Dupre, Clerk

By: /s/ MaryAnne McMain
MaryAnne McMain
Deputy Clerk

Order 86-6
(July, 1987, Rev. 9/88)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-0754-LFO

CHURCH BY MAIL, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

FILED

FEB 8 1989

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

In a Memorandum and Order filed on November 28, 1988, this court denied plaintiff's motion for summary judgment, granted defendants' motion for summary judgment, and dismissed the complaint in this action. Plaintiff has now filed a Motion for Reconsideration of the Judgment of this Court, arguing that this court has relied on the findings of the Tax Court and the Ninth Circuit in prior litigation. Plaintiff claims: "Reliance on those findings is error for at least three fundamental reasons: (1) Facts existing prior to July 1, 1985 are not relevant to these proceedings; (2) The reasons articulated by the prior courts for finding inurement are no longer present in the operation of Church, and facts no longer exist upon which this Court can conclude that Church's income is "funneled"

to any individual; and (3) The prior court decisions were based on a completely separate record which is not before this Court and therefore such findings cannot be compared to, or used as collateral estoppel in, this case." Plaintiff moves for reconsideration by this court of ten orders filed in this case, dating from June 29, 1987 to the final order dated November 28, 1988.

Defendants oppose plaintiff's motion, arguing that if it is considered to be a motion under Rule 59(e), Fed. R. Civ. P., it alleges insufficient grounds to support reconsideration of the court's ruling. Defendants argue that "a motion for reconsideration is not to be used, as [plaintiff] does here, to 'rehash arguments previously made' (*Lyle v. Kavanagh*, 112 F.R.D. 367, 371 (N.D. Tex. 1986)) or to be used 'to give an unhappy litigant one additional chance to sway the judge' (*Durkin v. Taylor*, 444 F. Supp. 879, 889 (E.D. Va. 1977))." Plaintiff agrees that its motion should be considered under Rule 59, but argues that this court does have "discretion to correct a judgment based on incorrect facts."

Many of the plaintiff's arguments in its motion for reconsideration were indeed raised in briefs and arguments during the summary judgment stage of this litigation. In any event, plaintiff's motion for reconsideration must be denied. This court's November 28, 1988 Memorandum and Order does not give collateral estoppel effect to facts found in prior litigation in the Tax Court and the Ninth Circuit, but applies to this case principles developed and standards set forth in previous cases. This court stated in its Memorandum and Order: "[Plaintiff] seeks to demonstrate that [the Reverends'] compensation is not excessive when compared to that realized by executives in the private sector." This court then applied to the facts of this case the benchmark developed by the Tax Court and the Ninth Circuit, concluding that "the compensation paid to Reverends Ewing and McElrath is manifestly excessive, benefits those with controlling interests in the allegedly charitable or-

ganization, and inures to their benefit." This court further found that "[e]ven if actual payment of manifestly excessive compensation were not inurement because the complex accounting makes precise tracing difficult without the services of an IRS Special Agent, there would be inurement here because the control exercised by Reverends Ewing and McElrath over all three related entities creates a 'potential for abuse.' " This court concluded that "[u]ndisputed facts demonstrate that, despite termination of the contract with Advertising," plaintiff has failed to establish that "no part of its earnings inures to the benefit of any private shareholder and that it was operated for an exclusively charitable purpose."

Accordingly, it is this 8th day of February, 1989, hereby

ORDERED: that plaintiff's Motion for Reconsideration shall be, and is hereby, denied.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-0754-LFO

CHURCH BY MAIL, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*

Defendants.

FILED
SEP 20 1988
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

A hearing was held in this matter on September 19, 1988. For the reasons stated from the bench, it is this 19th day of September, 1988 hereby

ORDERED: that plaintiff's motion to strike is DENIED; and it is further

ORDERED: that plaintiff's motion to restore the administrative record, to expunge documents from the administrative record, and for sanctions is DENIED, provided that plaintiff may, within 10 days, *lodge with the clerk of the court and present to defendant, but not file*, a copy of what plaintiff represents to be the original application for exemption with exhibits and three supplements with exhibits in the order originally presented to the Internal Revenue Service.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-0754-LFO

CHURCH BY MAIL, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

FILED

AUG 31 1988

Clerk, U.S. District Court
District of Columbia

ORDER

It is this 31st day of August, 1988 hereby

ORDERED: that counsel shall attend a hearing on plaintiff's motion to restore the administrative record and plaintiff's motion to strike on *September 19, 1988 at 1:30 p.m.* in Courtroom 3.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 87-0754-LFO

CHURCH BY MAIL, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA; LAWRENCE B. GIBBS, Commissioner of Internal Revenue; PETER K. BROS; WILLIAM W. MILLER, JR.; MILTON CERNY; DAVID DAUME; JOHN F. KELLY; and unknown agents of the Internal Revenue Service,

Defendants.

ORDER

Upon consideration of the Plaintiff's Motion for Summary Judgment and defendant's opposition thereto, it is this ___ day of _____, 1988,

ORDERED: that Plaintiff's Motion is hereby granted; and it is further

ORDERED: that the Commissioner of Internal Revenue shall grant plaintiff's Application for Exemption under Section 501(c)(3) of the Internal Revenue Code and grant plaintiff's application for classification as a church under Section 170(b)(1)(A)(i) of the Internal Revenue Code.

_____

United States District Judge

BLACKSTOCK JOYCE POLLARD
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ATTORNEYS FOR PLAINTIFF

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U. S. Department of Justice
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Washington, D.C. 20044

ATTORNEYS FOR DEFENDANTS

DNMIS6/004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 87-0754-LFO

CHURCH BY MAIL, INC.,

Plaintiff,

v.

UNITED STATES, *et al.*,

Defendants.

FILED
AUG 11 1988
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

Having considered defendant's motion for leave to file out of time, together with the memorandum of points and authorities in support thereof, and having further considered plaintiff's opposition thereto, the Court concludes that the motion ought to be granted. Accordingly, it is this 10th day of August, 1988,

ORDERED that defendant's motion for leave to file out of time be and hereby is GRANTED;

ORDERED that the Clerk shall receive and FILE defendant's answer to amended complaint; and it is further

ORDERED that the Clerk shall distribute conformed copies of this order to the representatives of the parties listed below.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-0754-LFO

CHURCH BY MAIL,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

FILED

JUN 29 1988

CLERK, U.S. DISTRICT COURT,
DISTRICT OF COLUMBIA

ORDER

By Order dated March 29, 1988, the Court, *inter alia*, set forth a schedule for filing of three motions for summary judgment with supporting memoranda of law and statements of material facts not in dispute, oppositions, replies, and a hearing date on the cross-motions.

On April 27, 1988, the Court granted plaintiff additional time to file its Amended Complaint and extended each date of the March 29, 1988 Order by fifteen (15) days.

Defendants have now requested an enlargement of time of an additional eleven (11) days to respond to the Amended Complaint and to extend each date by an additional eleven (11) days. Accordingly, it is this 28th day of June, 1988, hereby

ORDERED: that the March 29, 1988 Order is AMENDED in respect to paragraph 3 on page 2 to reflect that "each party shall file under seal but not serve, an opposition to the opponent's motion, ..." And it is further

ORDERED: that defendants' motion for an eleven day enlargement is GRANTED and their response to the Amended Complaint is due on or before July 27, 1988; and it is further

ORDERED: that the motions for summary judgment shall be filed under seal but not served on or before August 26, 1988; and it is further

ORDERED: that oppositions shall be filed under seal but not served on or before September 27, 1988; and it is further

ORDERED: that replies to the oppositions may be filed on or before October 12, 1988; and it is further

ORDERED: that there will be no further extensions granted in this case, except for extreme emergencies; and it is further

ORDERED: that the hearing on the cross-motions for declaratory and summary judgment is scheduled for November 9, 1988 at 9:00 A.M. in Courtroom No. 3.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 87-0754-LFO

CHURCH BY MAIL, INC.,
a non-profit Oklahoma corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA; LAWRENCE B. GIBBS, Commissioner of Internal Revenue; PETER K. BROS; WILLIAM W. MILLER, JR.; MILTON CERNY; DAVID DAUME; JOHN F. KELLY; and unknown agents of the Internal Revenue Service,

Defendants.

ORDER

Upon consideration of plaintiff's Motion to Restore the Administrative Record, to Expunge Document from Administrative Record, and for Sanctions, it is on this ___ day of _____, 1988, hereby ORDERED:

That plaintiff's Motion should be, and is hereby GRANTED; and it is further:

ORDERED: That this cause is set for hearing on the ___ day of _____, 1988, for a determination of the procedure by which the administrative record is to be restored, and for a determination on the sanctions to be imposed against defendants and their counsel.

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 87-0754-LFO

CHURCH BY MAIL, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FILED

APR 27 1988

CLERK, U.S. DISTRICT COURT,
DISTRICT OF COLUMBIA

ORDER

Upon consideration of the plaintiff's request for additional time within which to file its amended Complaint, and noting that defendants have no objection, it is this 26th day of April, 1988, hereby

ORDERED: That plaintiff shall be granted additional time to May 15, 1988, within which to file its amended Complaint pursuant to the Court's March 29, 1988, Order; and it is further

ORDERED: That each date specified in the Court's Order of March 29, 1988, shall be extended by fifteen (15) days.

/s/ Louis F. Oberdorfer
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-0754-LFO

CHURCH BY MAIL, INC.

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

FILED

MAR 29 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

Upon further consideration of the relevant precedents, including the seminal decision in *Houston Lawyer Referral Service, Inc. v. Commissioner,* 69 T.C. 570 (1978) (Featherston, C.J.), Tax Court Rules 120, 121, 211, 213 and 217 and Local Rule 108(h), it is this 28th day of March, 1988, hereby

ORDERED: that defendants' motion to quash should be, and is hereby, GRANTED; and it is further

ORDERED AND DECLARED: that the protective order filed June 30, 1987, remains in force; and it is further

ORDERED that:

On or before May 1, 1988, plaintiff shall file and serve an amended complaint for declaratory judgment that

plaintiff is qualified for tax exemption under 26 U.S.C. § 501(c)(3) and is a church within the meaning of 26 U.S.C. § 170(b)(1)(A)(i) in the form proscribed by Tax Court Rule 211(f).

On or before June 1, 1988, defendants shall file and serve an answer in the form proscribed by Tax Court Rule 213(a).

On or before July 1, 1988, plaintiff shall file and serve a reply in the form proscribed by Tax Court Rule 213(b).

On or before August 1, 1988, the parties shall file under seal but not serve, three copies of motions for summary judgment together with supporting memoranda of law and statements of material facts not in dispute as proscribed by Local Rule 108(h). Such statements of material facts shall be supported by specific page references from the administrative record.

On or before September 1, 1988, each party shall file under seal an opposition to the opponent's motion, supported by statements of genuine issues, also keyed to specific pages of the administrative record. When both parties have filed their motions and again when both parties have filed their oppositions, the Clerk will transmit copies of each party's filings to the opposing party.

On or before September 15, 1988, each party may file a reply to the opponent's opposition.

And it is further

ORDERED: that there will be a hearing on the cross-motions for declaratory and summary judgment on October 3, 1988 at 9:30 A.M.; and it is further

ORDERED: that plaintiff's motion to bifurcate the proceedings should be, and is hereby, DENIED.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-0754-LFO

CHURCH BY MAIL, INC.,

Plaintiff,

v.

UNITED STATES, *et al.*,

Defendants.

FILED

MAR 10 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

This matter is before the Court on plaintiff's motion to reconsider the Court's Order of January 22, 1988 and on defendants' motion for entry of additional findings of fact. In response to these post-ruling pleadings and in light of the decision of the Supreme Court in *Westfall v. Erwin*, 108 S.Ct. 580 (1988), it is this 10th day of March, 1988, hereby

ORDERED: that the fourth sentence in the second full paragraph on page eight of the Court's Memorandum filed on January 22, 1988 is hereby amended by striking the period and adding:

> ; nor does plaintiff allege that the defendants were not exercising substantial discretion in the

performance of their quasi-adjudicative function of reviewing applications for tax exemption.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-0754-LFO

CHURCH BY MAIL, INC.,

Plaintiff,

v.

UNITED STATES, *et al.*,

Defendants.

FILED

JUN 30, 1987

CLERK, U.S. DISTRICT COURT OF
DISTRICT OF COLUMBIA

ORDER

A status call was held in this action on June 18, 1987. Pursuant to colloquy with counsel, it is this 29th day of June, 1987, hereby

ORDERED: that defendants' motion for a protective order should be, and is hereby, GRANTED without prejudice; and it is further

ORDERED: that plaintiff shall file and serve any opposition to defendants' motion to dismiss and any opposition to defendants' motion for leave to file the administration record on or before July 16, 1987; and it is further

ORDERED: that defendants shall file and serve any reply on or before August 5, 1987.

/s/ Louis J. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-0754-LFO

CHURCH BY MAIL, INC.,

Plaintiff

v.

UNITED STATES, *et al.*,

Defendants

FILED

MAY 22, 1987

CLERK, U.S. DISTRICT COURT OF
DISTRICT OF COLUMBIA

ORDER FOR STATUS CALL
and
NOTICE TO COUNSEL

The complaint and answer have been filed in this case. It is necessary to schedule any motions, discovery, program, pretrial conferences, and trial. Accordingly, it is hereby

ORDERED: that counsel for the parties shall attend a status call on June 18, 1987 at 9:30 a.m. in Courtroom No. 3, U.S. Courthouse, Washington, D.C. Before the status call counsel shall confer about dates for the filing and hearing of any motions, completion of discovery, pretrial conference and dates for trial. It is further

ORDERED: that counsel for any corporation which is a party, *amicus*, or intervenor shall comply with Rule 1-

5A of the Rules of the United States District Court for the District of Columbia at or before the conference here scheduled.

Communications with chambers with regard to any aspect of this action shall be by motion *ONLY* (and not by letter or telephone), except in the most urgent circumstances.

Extensions of time for the filing of any pleading (whether or not consented to by opposing counsel) will *NOT* be granted, except in the most urgent circumstances (submitted to the Court by motion only and set forth in detail).

Dated: May 22, 1987 /s/Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1989

No. 89-5068

CA 87-0754

Church By Mail, Inc., a non-profit Oklahoma Corporation
Appellant

v.

United States of America, *et al.*

FILED FEB 20 1990

CONSTANCE L. DUPRÉ
CLERK

BEFORE: *Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

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* Chief Judge Wald did not participate in this matter.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1989

No. 89-5068

C.A. No. 87-00754

Church By Mail, Inc., a non-profit Oklahoma Corporation
Appellant

v.

United States of America, *et al.*

FILED NOV 27 1989

CONSTANCE L. DUPRÉ
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

BEFORE: Edwards, Silberman and Buckley, Circuit Judges

JUDGMENT

This case was considered on the record on appeal from the United States District Court for the District of Columbia and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 14(c). It is

ORDERED and ADJUDGED that the district court's order filed January 22, 1988, granting appellees' motion to dismiss Counts I through IV and the district court's

order filed November 28, 1988, granting appellees' motion for summary judgment and denying appellant's motion for summary judgment, be affirmed substantially for the reasons stated by the district court in those orders and the accompanying memoranda. It is

FURTHER ORDERED and ADJUDGED that the district court's orders filed June 29, 1987, October 30, 1987, March 29, 1988, and September 19, 1988, be affirmed. The district court's rulings did not constitute an abuse of discretion.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

Bills of cost must be filed within 14 days after copy of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 87-0754-LFO

CHURCH BY MAIL, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA; LAWRENCE B. GIBBS, Commissioner of Internal Revenue; PETER K. BROS; WILLIAM W. MILLER, JR.; MILTON CERNY; DAVID DAUME; JOHN F. KELLY; and unknown agents of the Internal Revenue Service,

Defendant.

(ATTACHMENT TO ARGUMENT AND AUTHORITY FOR MOTION FOR SUMMARY JUDGMENT)

STATEMENT OF UNCONTROVERTED MATERIAL FACTS

The following is a list of material facts as to which Church contends there is no genuine issue pursuant to Rule 108(h) of the U. S. District Court Rules - D.C. With each fact is a reference to the part of the Administrative Record relied on by Church in support of the statement of fact. References to the Administrative Record are generally to the document numbers ("Doc. #") assigned by the United States in its "Appendices" as supplemented (Administrative Record). Where necessary to assure the Court's ability to locate the documents, Church has at-

tempted to identify documents by reference to other identifying labels in addition to the United States' assigned numbers. See Church's Motion to Restore Administrative Record, Expunge Document from Administrative Record and for Sanctions and brief in support thereof for details of documents which are mislabeled or misplaced in the Administrative Record.

1. An application for Exemption from taxation pursuant to §501(c)(3) was mailed to the Internal Revenue Service at the District Office in Dallas, Texas, on December, 1985. [Admitted - See Answer to Amended Complaint, Fourth Defense, ¶II.]

2. Church's qualification as a church and as an exempt organization under §501(c)(3) is at issue in these proceedings. [Admitted - See Answer to Amended Complaint, Fourth Defense, ¶III.]

3. Church has exhausted its administrative remedies within the Internal Revenue Service. [Admitted - See Answer to Amended Complaint, Fourth Defense, ¶IV.]

4. Church was formed to operate exclusively for religious purposes. [Not contested by defendant's Final Ruling - See attachment to First Amended Complaint; see also Doc. #2 (Application), Exhibit B, Article Four, Articles of Incorporation.]

5. Church believes that the term "church" as used in the New Testament consists of a worldwide, inter-denominational body of believers. [Doc. #2, Exhibit B (Bylaws) Article II.B ¶1, page 3.]

6. It is Church's mission to preach the Gospel of Jesus Christ to as many people as possible. [Generally, Article II. Bylaws; also Article II.B Bylaws, page 6 (first full ¶) (all at Doc. #2, Exhibit B).]

7. Church has no income which is unrelated to its religious purpose. [Not contested by defendant's Final Ruling. See Attachment to First Amended Complaint.]

8. From November 28, 1978, through April 30, 1986, Church mailed over 60,000,000 pieces of gospel literature to its members and nonmembers across the nation. [Doc. #14, page 27, ¶116.]

9. Church has received in excess of 11,000,000 responses from persons seeking spiritual, physical and financial help and guidance and Church has answered each and every one. [Doc. #14, page 27, ¶116; Doc. #22 (Protest), page 22, ¶149(2).]

10. Almost every response mentioned in the immediately preceding fact No. 9 consists of a prayer request or a testimony that God has answered prayer as a result of the church services conducted by Church. [Doc. #22 (Protest), page 23, ¶49(3).]

11. Over 800,000 persons have written Church requesting Reverend Ewing to pray for their salvation. Reverend Ewing has prayed for the salvation of each of these 800,000 people. [Doc. #22 (Protest), page 23, ¶49(4),(5).]

12. At the time of the application for the exemption, a total of 3,360,000 persons had received *and responded* to mailings from Church. [Doc. #22 (Protest), page 64, ¶160.]

13. In addition to its mailings to its members, Church conducts numerous crusades and special church services from time to time in different parts of the United States. [Doc. #2 (Application), Exhibit E, page 1, last sentence and page 2, ¶5; Doc. #14, page 33 ¶141; This allegation is also admitted in part. See Answer to Amended Complaint, Fourth Defense ¶V.A.9.]

14. Payments made by Church to Twentieth Century Advertising Agency, Inc. ("Twentieth") are for reimbursement, with interest, of out-of-pocket funds paid by Twentieth on behalf of Church to unrelated third parties primarily for printing and mailing services in the conduct of Church's religious activities. [Doc. #2 (Application), Ex-

hibit E, page 3, last ¶; Doc. #14, page 38, ¶167; Doc. #22 (Protest), Section I, pages 2-5; Doc. #24, page 4, ¶5.]

15. Effective July 1, 1985, Church's prior contract with Twentieth was cancelled and Twentieth no longer performs services for Church. [Doc. #2 (Application), Exhibit E, page 3, last ¶; Doc. #14, page 42, ¶178 & page 38, ¶167; Doc. #22 (Protest), Section I, pages 2-5; Doc. #24, page 4, ¶5; The fact that the prior contract with Twentieth was cancelled is admitted. See Answer to Amended Complaint, Fourth Defense, ¶V.B.1.]

16. Church owes Twentieth for the principal amount of funds previously advanced on behalf of Church by Twentieth from its own funds earned in consulting activities unrelated to Church's operations. [Doc. #2 (Application), Exhibit E, page 3, last ¶; Doc. #14, page 42, ¶178 & page 38, ¶167; Doc. #22 (Protest), Section I, pages 2-5; Doc. #24, page 4, ¶5; This stated fact is admitted in part. See Answer to Amended Complaint, Fourth Defense, ¶V.B.2.]

17. Interest is owed on that principal amount to Twentieth at the same rate charged by the U. S. Government as determined pursuant to Revenue Ruling 84-163, as amended from time to time. [Doc. #2 (Application), Exhibit E, page 3, last ¶; Doc. #14, page 42, ¶178 & page 38, ¶167; Doc. #22 (Protest), Section I, pages 2-5; Doc. #24, page 4, ¶5.]

18. Church continues to receive benefits from Twentieth at no charge. Twentieth has guaranteed notes by Church and guarantees the payment of certain obligations of Church to various trade creditors so that Church can operate directly with third-party vendors for its printing and mailing services. Twentieth neither has received nor will receive any compensation or benefits for such guarantees. [Doc. #14, page 42, ¶178; Doc. #22 (Protest), Section I, pages 2-5; Doc. #24, page 4, ¶5.]

19. Since July 1, 1985, the only benefits received from Church by Reverends Ewing and McElrath and their fam-

ilies are the compensation received by those individuals for services performed for Church. [Doc. #14, pages 53-54, ¶223; Doc. #22 (Protest), page 11, ¶20.]

20. Since July 1, 1985, the only members of Reverend Ewing's family who have received compensation from Church are as follows: Brenda Bofman (his daughter) and Paul Ewing (his son). [Doc. #14, page 45, ¶188 and page 57, ¶238; Doc. #16 (Exhibit 28-1 as corrected) (The *uncorrected* Exhibit 28-1 was attached by the IRS to Doc. #14 where it remains. Exhibit 28-1 as corrected was labeled by the IRS as Doc. #16 and placed outside the proximity of Doc. #14.)]

21. Since July 1, 1985, no member of Reverend McElrath's family has received compensation from Church. [Doc. #14, page 45, ¶188; Doc. #16 (Exhibit 28-1 as corrected. See explanation in fact No. 20 as to location.)]

22. Since July 1, 1985, no parsonages or parsonage expenses have been provided by Church to Reverend Ewing or Reverend McElrath. [Doc. #14, pages 51-52, ¶214, ¶215 and page 53, ¶223; Doc. #22 (Protest), page 58, ¶147; Doc. #24, pages 2-3, ¶2.]

23. Since July 1, 1985, no automobiles or automobile expenses have been provided by Church for the personal use of Reverend Ewing or Reverend McElrath. [Doc. #14, page 54, ¶223, page 41, ¶176; Doc. #22 (Protest), pages 10-11, ¶19(4).]

24. Since July 1, 1985, no loans have been made by Church to either Reverend Ewing or Reverend McElrath. [Doc. #14, pages 53-54, ¶223.]

25. Since July 1, 1985, no wardrobe or wardrobe expenses have been provided to Reverend Ewing or Reverend McElrath. [Doc. #14, pages 53-54, ¶223.]

26. Since July 1, 1985, no personal travel expenses have been paid by Church for Reverend Ewing or Reverend McElrath. [Doc. #14, pages 53-54, ¶223.]

27. The only fringe benefits Church provides to Reverend Ewing, Reverend McElrath or their families are pursuant to a medical benefits policy and medical reimbursement which is provided to all employees of Church. [Doc. #14, pages 53-54, ¶223.]

28. Non-business meals are not provided by Church for Reverend Ewing or Reverend McElrath. [Doc. #14, pages 53-54, ¶223.]

29. During the year 1985, Church paid the following salaries to Reverends Ewing and McElrath and members of their families:

Reverend Ewing	$69,000
Reverend McElrath	66,020
Brenda Bofman (Ewing's Daughter)	28,000
Paul Ewing (Ewing's Son)	6,125

[Doc. #14, page 45, ¶188; Doc. #16 (Exhibit 280-1, See explanation at fact No. 20 as to location); Doc. #22 (Protest), page 15, ¶27 and page 23, ¶51.]

30. During 1985, Church had gross receipts from contributions and crusades of $7,245,321. Gross receipts for the prior year (1984) were $13,558,958. [Doc. #22 (Protest), page 15, ¶27 and ¶28; Doc. #27(k) (Financial Statement - December 1985, page 005.)] (Note: This financial statement is Exhibit 25-12 to Doc. #14 but was separated and labeled Doc. #27(k) by the IRS).

31. The duties and job description for Church of Reverend Ewing are as follows (Note: This stated fact is contained in a single entry for convenience of citation to the Administrative Record and because it is essentially a direct quotation from the Administrative Record.):

> *Reverend Ewing, President*: Reverend Ewing's day at the office beings at 8:00 a.m. with prayer for members and church work followed by a morning financial

meeting. Breakfast is served to those employees present while working at this meeting. The daily production and general business meeting is held immediately following the financial meeting. Both meetings usually last from one to four hours each day Monday through Friday. From time to time some employees may be dismissed from the meeting to carry out duties which require attention. The remainder of the day is usually spent on the phone either making or receiving calls with legal counsel, relating to Church's overall business, and calls with other ministers who are not associated with Church, ministering and praying with them and giving them advice and encouraging them in their work that God has called them to do. Reverend Ewing is subject to placing or receiving these types of calls at any hour of the day or night. Time is also spent ministering to Church's members by phone who are known personally and praying and encouraging them to put their faith in God and his promises to them in his work. Reverend Ewing is also subject to placing or receiving these types of calls at any hour of the day or night. Reverend Ewing spends time on the phone or by intercom with personnel of Church regarding the many phases of Church's day-to-day business including prayer, reading, writing, editing, studying. Reverend Ewing is primarily responsible for creating and writing the voluminous religious material used in the services by mail to members. All of these types of things consume a large part of Reverend Ewing's nights and weekends. Reverend Ewing has an office in his apartment where he also does work for Church.

[Doc. #14, page 14, ¶32-35.]

32. The duties and job description for Church of Reverend McElrath are as follows (Note: This stated fact is contained in a single entry for convenience of citation to

the Administrative Record and because it is essentially a direct quotation from the Administrative Record.):

> *Reverend McElrath, Vice President/Secretary*: Reverend McElrath's day at the office begins at 8:00 a.m. Like Reverend Ewing, his work day often begins much earlier. He also has an office in his apartment. He attends the financial and production meetings described in the job description for Reverend Ewing. Reverend McElrath is in charge of monthly budget forecasting and supervises departmental assistants including Brenda Bofman, Executive Secretary and Business Computer Operator. He is in charge of overall mail analysis, census tract and geographical population analysis, marking out cities for special evangelical mailings, designing almost all computer programs for main frame (not actual computer programing but laying out and specifying all programing objectives). He performs the same type of work for in-house business computers and writes programs for these business computers. He also negotiates arrangements for printing, mailing and computer work. Reverend McElrath assists in the creation, writing and editing of religious publications described in Reverend Ewing's job description.

[Doc. #14, pages 14-15, ¶36-37.]

33. The duties and job description for Church of Brenda Bofman are as follows (Note: This stated fact is contained in a single entry for convenience of citation to the Administrative Record and because it is essentially a direct quotation from the Administrative Record.):

> *Brenda Bofman, Assistant to Vice President Reverend McElrath*: Brenda Bofman performs daily mail analysis, operates the office computer and does record work, file clerk work, and general secretarial work. Ms. Bofman's day begins at 8:00 a.m. She works with Reverend Luce (on the phone from her office or at

morning business meetings) regarding estimation of volume of incoming mail. She tracks the mail from the Atlanta post office to Commercial National Bank in Tulsa, estimates amount of donations that will be received in each day's mail, monitors Commercial National Bank's daily performance which includes estimating number of letters the bank will receive each day from Atlanta post office, corrects previous day's estimated volume of mail to actual letter counts using Commercial National Bank's information, updates applicant Church's estimated amount of donations to actual amount as Commercial National Bank finishes extracting all donations and makes deposits into Church's bank account. After Ms. Bofman's meeting with Reverend Luce, she takes all information accumulated and verifies it with the office of J. C. Joyce (legal counsel in Tulsa, Oklahoma) and when that information has been determined to be accurate, she prepares a flow chart showing the daily trend of the response mail from the first day of the current month until a current day's estimate period. These reports are extremely confidential and of the utmost importance for Reverend Ewing and Reverend McElrath in their daily financial meetings. From these daily reports can be estimated the amount of donations that will be received during the month so that it can be estimated in advance if the budget will be met. The remainder of Brenda Bofman's work day is spent assisting Reverend McElrath in all types of secretarial work.

[Doc. #14, pages 17-18, ¶55-58.]

34. The duties and job description for church of Paul Ewing are as follows (Note: This stated fact is contained in a single entry for convenience of citation to the Administrative Record and because it is essentially a direct quotation from the Administrative Record.):

Paul Ewing, Assistant to President Reverend Ewing and Production Manager Reverend Luce: Paul Ewing's day beings [sic] with picking up business mail in Culver City, California, after which, he comes to the office by 8:00 a.m. in time for the morning business meetings. He participates in morning business meetings with the President, Vice President, and Treasurer, and others attending those meetings. He assists President Reverend Ewing in duties that vary substantially according to the priorities of Reverend Ewing's daily work. Paul Ewing assists Production Manager Reverend Luce in his daily work. Paul Ewing's work day fluctuates according to the needs of Reverend Luce. He sometimes is assigned to locate a particular product and regularly is sent to various vendors' offices as a trusted liaison of Reverend Luce. Paul Ewing assists Reverend Luce in meeting deadlines on production of Church's regular monthly mailings. Paul Ewing is also of great value as a participant in Church's crusades and special church services.

[Doc. #14, pages 18-19, ¶59-61.]

35. M. R. McElrath, Jr., Reverend McElrath's son, performs no services for, and receives no compensation, from Church. [Exhibit 3-b-1 attached to Doc. #14 (Note: As originally submitted to the IRS, this exhibit, along with numerous other exhibits to Doc. #14, were separately identified in file folders as exhibits. Exhibit 3-b-1, along with a portion of the other exhibits, were removed by the IRS from identifying folders and attached to Doc. #14 in some cases without retaining the original identification of the exhibit).]

36. Management of Church has never worked, nor does it intend to work, a mere 8-hour day (40-hour week). Management works the hours necessary to do what needs to be done, which often amounts to time in excess of 12 hours per day. [Doc. #14, page 28, ¶118.]

37. Reverend Ewing and Reverend McElrath devote almost the entirety of their waking hours to their employment by Church and Church and Bible Study In The Home By Mail, a related organization. It is difficult, if not impossible, to divide the time they spend between those two organizations since most efforts expended on behalf of one organization benefits the other organization either directly or indirectly. [Doc. #14, page 54, ¶225.]

38. The salaries paid by Church and Bible Study In The Home By Mail to Reverends Ewing and McElrath and their families during 1985 are contained in the following table:

Reverend Ewing	$17,250
Reverend McElrath	16,505
Brenda Bofman (Rev. Ewing's Daughter)	7,000
Paul Ewing (Rev. Ewing's Son)	6,125

[Doc. #22 (Protest) page 23, ¶51; Doc. #16 (Exhibit 28-1 as corrected. See explanation in fact No. 20 as to location.)]

39. The duties for Church and Bible Study In The Home By Mail of the persons listed in fact No. 38 above are similar to their duties for Church. [Doc. #14, page 54, ¶225.]

40. Church and Bible Study In The Home By Mail is an exempt organization under §501(c)(3) of the Internal Revenue Code. [Admitted. See Answer to Amended Complaint, Fourth Defense, ¶V.C.18.]

41. The nature of Twentieth Century Advertising Agency, Inc.'s business is such that very little time is expended by Reverends Ewing and McElrath for Twentieth. Reverend Ewing spends approximately five hours per week for Twentieth, generally in the evening hours, with Reverend McElrath spending approximately two hours

per week for Twentieth. [Doc. #14, page 54, ¶225; Doc. #24, page 3, ¶3 and Exhibit 3-A thereto.]

42. All of the funds derived by Church, Church and Bible Study In The Home By Mail and [Advertising] are deposited and maintained in separate bank accounts. No funds of any one organization are commingled with funds of any of the other organizations. [Doc. #14, page 67, ¶276 and Exhibit 41-1 to Doc. #14; Doc. #22 (Protest), page 76, ¶188; Doc. 14, page 11, ¶22 and Exhibit 1(g) thereto. (Note: Exhibits 41-1 and 1(g) are believed to be attached to Doc. #14 and may no longer be identifiable by an exhibit number. Exhibit 41-1 is a one-page document dated May 22, 1986 from Commercial National Bank regarding treatment of funds. Exhibit 1(g) is a series of agreements on Commercial National Bank letterhead dated respectively March 1, 1985, October 7, 1985, January 13, 1986 and March 19, 1986.)]

43. Reverend Ewing and Reverend McElrath offer a unique contribution to the success of Church. The evangelistic ministry of Church, aimed at a wide variety of persons across the United States, is uniquely communicated by the mail. But for the singular efforts of Reverends Ewing and McElrath, Church would never have existed and would not be the successful vehicle for communicating the Christian Gospel message which it is. [Doc. #22 (Protest) page 16, ¶33.]

44. Church's outreach is predicated upon Reverend Ewing's unique message of abundant living through the power of God. It is his following which supports the ministry of Church and Church's income is entirely dependent upon voluntary contributions primarily as a result of his efforts. The religious message of Church is effective, topical and meets the needs of thousands of persons. This message would be ineffective absent the contributions of Reverends Ewing and McElrath. [Doc. #22 (Protest) page 17, ¶36.]

45. The compensation paid to Reverend Ewing and Reverend McElrath and their families is reasonable when compared to the compensation paid to persons in other jobs performing comparable duties and obtaining comparable results. [Doc. #22 (Protest), Exhibit B, page 4; Doc. #22 (Protest) Exhibit C, page 2, last ¶; Doc. #22 (Protest) pages 23-26 beginning with ¶50.]

46. From a date prior to the date of Church's application for exemption, Twentieth no longer does any business with Church. The only remaining relationship between Twentieth and Church is that Church owes Twentieth for the funds advanced on behalf of Church by Twentieth from its own funds, and Twentieth, from time to time, has facilitated credit or provided its name in support of loans and leases made to Church by third parties. [Doc. #2 (Application), Exhibit E, page 3, last ¶; Doc. #14, page 42, ¶178 and page 38 ¶167; Doc. #22 (Protest), Section I, pages 2-5; Doc. #24, page 4, ¶5.]

47. Twentieth has not charged Church for the credit accommodation described in the last clause of fact No. 46 above. [Doc. #14, page 42, ¶178; Doc. #22 (Protest), page 4, top ¶.]

48. Twentieth requires little, if any, office space or equipment to perform its services to unrelated religious organizations which consist primarily of consulting with respect to mailings by religious organizations. Reverend Ewing and Reverend McElrath perform these services primarily at home and spend relatively insignificant amounts of time on them. [Doc. #24, page 5, ¶5(b); Doc. #14, page 42, ¶178; Doc. #14, page 54, ¶225.]

49. Twentieth's use of office space and equipment common to Church is minimal and is less than one percent of total usage. [Doc. #14, page 42, ¶178.]

50. Twentieth pays Church and Church and Bible Study In The Home By Mail a minimum of $200 per month to

compensate those organizations for the limited usage it makes of telephone and office space. [Doc. #14, page 42, ¶178.]

51. The $200 fee exceeds the fair market value of such usage. [Doc. #14, page 42 ¶178.]

52. Church has a distinct legal existence. [Admitted. See Answer to Amended Complaint, Fourth Defense, ¶V.E.1.]

53. Church has a religious creed and form of worship. [Doc. #14, page 5, ¶6; See Attachment to Affidavit of James E. Ewing, Sr. attached to Doc. #2 (Application); This fact is also admitted in part. See Answer to Amended Complaint, Fourth Defense, ¶V.E.2.]

54. Church has ministers who minister the Gospel of Jesus Christ to Church's members. [Doc. #14, page 5, ¶6; See Attachment to Affidavit of James E. Ewing, Sr. attached to Doc. #2 (Application); This fact is also admitted in part. See Answer to Amended Complaint, Fourth Defense, ¶V.E.3.

55. Church conducts worship, sacerdotal functions and crusades. Doc. #14 page 5, ¶6; See Attachment to Affidavit of James E. Ewing, Sr. attached to Doc #2 (Application); This fact is also admitted in part. See Answer to Amended Complaint, Fourth Defense, ¶V.E.4.]

56. Church has literature of its own. [Doc. #14, page 5, ¶6; See Attachment to Affidavit of James E. Ewing, Sr. attached to Doc. #2 (Application); This fact is also admitted in part. See Answer to Amended Complaint, Fourth Defense, ¶V.E.5.]

57. Church has a regular congregation and regular religious services by mail. [Doc. #14, page 5, ¶6; See Attachment to Affidavit of James E. Ewing, Sr. attached to Doc. #2 (Application.]

58. The 14 criteria have never been adopted by the Internal Revenue Service pursuant to applicable procedural requirements for rule-making. [Admitted. See Answer to Amended Complaint, Fourth Defense, ¶V.H.2.]

59. The 14 criteria have been applied to Church in a rigorous, inflexible fashion amounting to much more than mere flexible guidelines. [Doc. #23; This fact is also admitted in part. See Answer to Amended Complaint, Fourth Defense, ¶V.H.3.]

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 87-0754-LFO

CHURCH BY MAIL, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

UNITED STATES' STATEMENT OF MATERIAL FACTS

Defendant, United States, hereby submits that the following are material facts not in dispute.[1]

(a) *Procedural History.*

1. On December 10, 1985, Church By Mail, Inc. ("CBM") filed an Application for Recognition of Exemption Under Code Section 501(c)(3) of the Internal Revenue Code (Form 1023) (App. 2, 3 and 28).

2. CBM's application was initially assigned to the Internal Revenue Service Los Angeles District, and was subsequently transferred to the National Office of the Internal Revenue Service in Washington, D.C. (App. 4, 5, and 8).

3. The Internal Revenue Service, Exempt Organizations Ruling Branch ("Commissioner" or "Internal Revenue Service") requested, by letters dated April 11 and April 24, 1986, further information in the form of forty-one points pertaining to CBM's application (App. 10, 11. 12 and 13).

---

[1] References to the Administrative Record set forth in the Appendix filed with Court are designed as "App."

4. On or about May 20, 1986, CBM submitted a response to the information requested (App. 15, 15, 16, 27, 18 and 29).

5. On August 6, 1985, the Internal Revenue Service issued a ruling denying CBM's application (App. 17).

6. CBM responded to the ruling, and requested an informal conference with the Internal Revenue Service, which was denied, but CBM was permitted to submit further information to support its application (App. 18 and 19).

7. On October 3, 1986, CBM filed a written "protest" to the ruling (App. 20, 21, Ex. E and 22).

8. A conference between the Internal Revenue Service and CBM was held on November 11, 1986 (Ex. 23).

9. CBM submitted further information following the conference (App. 24 and 25).

10. A final determination of the Internal Revenue Service was issued on January 21, 1987, denying CBM's application (App. 26).

(b) *Statement of Facts*

1. Church By Mail, Inc. ("CBM") was incorporated under the laws of the State of Oklahoma on November 28, 1978 as a not-for-profit organization (App. 2, pg. 1, para. 6; App. 14, Ex. 34-1).

2. CBM's registered office is located at 300 Petroleum Club Building, Tulsa, Oklahoma 74119 (App. 2, Ex. B.)

3. CBM's registered agent is Craig Blackstock, Esquire (App. 2, Ex. B.).

4. The place where CBM's books and records are kept is located at 515 S. Main Mall, Suite 300, Tulsa, Oklahoma 74102. Most check writing occurs there (App. 14, pg. 43 para. 183; App. 14, pg. 13 para. 29).

5. The law firm of Blackstock, Joyce, Pollard & Montgomery, counsel for CBM, is located at 515 South Main

Mall, Suite 300, Tulsa, Oklahoma 74103 (App. 1; App 9; App. 1(c), pgs. 23-37; App. 14, pg. 14 para. 29).

6. CBM's administrative office since at least December, 1985 to March, 1986 was located at 6334 Arizona Place, Los Angeles, California 90045 (App. 2, "Attachment to part I," line 3(a) App. 14, pg. 12 para. 21; App. 14, pg. 52 para. 214).

7. The administrative office of Twentieth Century Advertising Agency ("Advertising"), since at least December, 1985 to March, 1986, was located at 6334 Arizona Place, Los Angeles, California 90045 (App. 14, pg. 42 para. 178; App. 24 pg. 5 para. 5(b)).

8. The administrative offices of Church and Bible Study in the Home By Mail ("CBSHM"), since at least December, 1985 to April, 1986 was located at 6334 Arizona Place, Los Angeles, California (App. 14, pg. 46 para. 193; App. 14, pg. 8 para. 10).

9. Since April, 1986, CBM, Advertising and CBSHM share office space in a single complex at 4267, 4270, and 4300 Promenade Way, Marina del Rey, California 90292. (App. 14, pgs. 12-14 para. 28; App. 14, pg. 31 para. 139; App. 2, Ex. 1(c), pgs. 1-22).

10. The founders of CBM are Reverends James Ewing, Milton R. McElrath, Donald R. Luce and O. Duane Snyder (App. 2, Ex. E).

11. The officers of CBM are James E. Ewing (president), M.R. McElrath (vice president and secretary) and D.R. Luce (assistant secretary and treasurer) (App. 2, part III para. 4(a); App. 14 pg. 58 para. 240).

12. The Board of Trustees of CBM is comprised of Reverends Ewing, McElrath and Luce (App. 2, Ex. E; App. 2, Ex. B article V).

13. CBM also has an office at 2508 234th Street, Torrance, California (App. 2, Ex. 1(c) pg. 38; App. 14, pg. 13,

para. 30). This is the residence Duane Snyder and his wife Evelyn Snyder (App. 22, pgs. 58-59).

14. The residence of Rev. Ewing is 4267 Marina City Drive, No. 5, Marina Del Rey, California 90292 (App. 14, pg. 31 para. 739; App. 14, pg. 51 para. 214; App. 22 pgs. 56-57).

15. The residence of Rev. McElrath is 4314 Marina City Drive, No. 20, Marina del Rey, California 90292 (App. App. 14, pgs. 12-13, para. 28).

16. The sole shareholders of Advertising are Rev. Ewing and Rev. McElrath (App. 14, pg. 55 para. 229).

17. The sole shareholders of CBSHM are Rev. Ewing and Rev. McElrath (App. 14, pg. 38 para. 167).

18. Advertising has a mailing address of P.O. Box 2333, Los Angeles, California 90052 (App. 14, pg. 47 para. 197).

19. CBSHM has a mailing address of P.O. Box 2327, Culver City, California (App. 14, pg. 46 para. 193).

20. All mail of CBM is received at P.O. Box 3261 or Box 3321, Atlanta, Georgia. CBM also maintains, but does not use, Boxes 3169, 4102 and 4572. (App. 14, pg. 11 para. 22).

21. All mail to CBM is sent to Atlanta. The mail is then delivered to the Commercial National Bank in Tulsa, Oklahoma where all money is separated and deposited in an account. The correspondence is then forwarded to CBM's office in California (App. 2, Ex. D).

22. CBM operates solely through the mail. It has no facility, other than administrative offices. It conducts no periodic services (App. 14, pgs. 5-6 para. 6; App. 2, Ex. D).

23. Less than one percent of all money received by CBM goes to any charitable organization or cause. CBM supports no charity or disadvantaged group (App. 2, part IV "Financial Data").

24. Most of CBM's expenses are for printing, mailing, postage and salaries (App. 2, Part IV "Financial Data"; App. 14, pg. 7 para. 9)

25. CBM does not have a defined and distinct ecclesiastical government; does not have ordained ministers; does not maintain established places of worship; does not offer school, training or instruction to adults or children and, has no regular congregation (App. 14, pgs. 5-6 para. 6).

26. CBM has 33 employees. Four are officers. Seven are relatives of the officers. Nine perform clerical or maintenance work. Seven process the mail. Three do accounting or bookkeeping work and three prepare literature. (App. 14, pgs. 14-26; App. 14, pg. 58; App. 14, pg. 46).

27. All employees of CBM, except for one, are also employed by CBSHM. Some employees of CBM are also employees of Advertising (App. 14, pg. 58; App. 14, pg. 46).

28. Reverends Ewing and McElrath control the operations of CBM (App. 29; App. 16, pgs. 16-18, 21, 23).

29. In 1985, Reverend Ewing received $345,379 in combined salary from CBM ($69,000); CBSHM ($17,250) and Advertising ($259,129) (App. 14, Ex. 22-2; App. 14, Ex. 3-b-1).

30. In 1985, Reverend McElrath received a combined salary of $341,635 from CBM ($66,020), CBSHM ($16,505) and Advertising ($259,130) (App. 14, Ex. 22-3; App. 14, Ex. 3-b-1).

31. In 1985, Reverend Ewing's son and daughter work for CBM, CBSHM and/or Advertising, and they earned a combined salary of $95,729.98 from CBM ($13,124.98), CBSHM ($34,125) and Advertising ($8,479.38) (App. 16, Ex. 28-1 corrected; App. 14 pg. 45 para. 188).

32. In 1985, Reverend McElrath's son worked for Advertising and earned a salary of $7,166.68 (App. 16, Ex. 28-1 corrected).

33. In 1985, Reverend Luce (assistant secretary) and his family earned a combined salary of $161,514.77 from CBM ($95,442.18), CBSHM ($55,872.59) and Advertising ($10,200) (App. 14, Ex. 3-b-1; App. 14, pg. 45, para. 18; App. 14, pg. 57, para. 236).

34. In 1985, O.D. Snyder (one of the founders), who is disabled, and his family, earned a combined salary of ($131,265.43) from CBM. (App. 14, Ex. 3-b-1; App. 14, pg. 25 para. 101, App. 2, Ex. 1(c) pg. 38).

35. Mrs. Snyder received $1,400 a month from CBM for rental space in her home (App. 2, Ex. 1(c) pg. 38).

36. In 1985, J.C. Joyce (counsel of record for plaintiff), and his relatives, earned a combined total of $321,276.91 from CBM ($291,000 personal retainer and $9,000), CBSHM ($6,276.91) and Advertising $27,000) (App. 14, pg. 44 para. 187).

37. CBM paid Advertising $3,108,003.40 in 1985 as reimbursement for alleged out-of-pocket expenses (App. 27(a)-(1); App. 2, Ex. E pgs. 2-4, App. 14, Ex. 16-1).

38. CBM intends to pay Advertising $2,303,056.49 at an unspecified time in the future, with 15 percent interest, as reimbursement for alleged out-of-pocket expenses remaining unpaid as of December 31, 1985 (App. 27(1) pg. 28 (Dec. 1985); App. 24, pg. 4 para. 5(a)).

39. Reverends Ewing and McElrath work in excess of 40-hour weeks for CBM (App. 14, pg. 28 para. 118; App. 14, pg. 54 para. 225; App. 14, pg. 24 pg. 3 para. 3).

40. Advertising has little or no need for office space and has had no business acitivity (App. 14, pg. 54 para. 225; App. 14, pg. 49 para. 206; App. 14, pg. 42 para. 178).

41. Advertising paid $573,905.02 in salaries to Reverends Ewing, McElrath and their families (App. 16, Ex. 28-1 corrected; App. 14, Ex. 3-b-1).

42. CBM and CBSHM share expenses (App. 14, pg. 8 para. 10; App. 14, pg. 51 para. 212).

43. CBM and CBSHM share office space (App. 14, pg. 41 paras. 177-78).

44. CBM and CBSHM share mailing lists (App. 14, pg. 38 para. 167; App. 14, pg. 39 para. 169).

45. CBM advances expenses to CBSHM (App. 14, pg. 36 para. 151-52)

46. CBM and CBSHM share a post office box (App. 14, pg. 37 para. 158).

47. CBM and CBSHM maintain a joint ledger for keeping track of the finances of both organizations. (App. 27; App. 24, pg. 2 para. 2).

48. CBM and Advertising share office space (App. 14, pg. 12 paras. 28; App. 14, pg. 31 para. 139).

49. Advertising extends credit, guarantees payment and co-signs on loans to CBM. (App. 14, pg. 42 para. 178; App. 24, pg. 5 para. 5(a); App. 22, pg. 4; App. 22, pg. 91; App. 14, pg. 66 para. 272).

50. Reverends Ewing and McElrath live in the same complex of buildings where the offices of CBM, CBSHM and Advertising share office space (App. 2, Ex. 1(c); App. 14, pg. 13 para. 28).

51. Advertising did not pay rent to CBM (App. 22, pgs. 73-74).

52. This complex has security guards, 24-hours a day (App. 22, pg. 57).

53. CBM owns three vehicles, a Blazer, a Suburban and a Mini-Van. (App. 14, pgs. 59-60 para. 243; App. pg. 78 and attached lease agreements).

54. Advertising leases three Rolls Royces (App. 14, pgs. 59-60, para. 243).

55. CBSHM owns one vehicle (App. 14, pgs. 59-60 para. 243).

56. Reverend Ewing owns a Masarati (App. 14, pgs. 59-60 para. 243).

57. Reverend McElrath owns three vehicles, a Ferrari, a Cadillac and a Mustang (App. 14, pgs. 59-60 para. 243).

58. Reverends Ewing, McElrath and their families receive life and health insurance and vacation pay (App. 14, pg. 54 para. para. 221; App. 14, Ex. 21-a, b, c, d, e-1).

59. Reverend Ewing and McElrath have personally guaranteed in excess of one million of CBM's debt (App. 14, pg. 64 para. 247; App. 2, Exs. 1(a), 1(i)).

60. IN its 1984 tax return (filed on or about September 15, 1985) CBM listed an account payable due Advertising at the beginning of the year of $3,363 and, at the end of the year, $2,791,976 (App. 14, Ex. 25-8 p. 15).

Respectfully submitted,

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OF COUNSEL:

JAY B. STEPHENS
United States Attorney

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 87-0754-LFO

CHURCH BY MAIL, INC.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA; LAWRENCE B. GIBBS, Commissioner of Internal Revenue; PETER K. BROS; WILLIAM W. MILLER, JR.; MILTON CERNY; DAVID DAUME; JOHN F. KELLY; and unknown agents of the Internal Revenue Service,

Defendant.

PLAINTIFF'S RESPONSE IN OPPOSITION TO UNITED STATES' STATEMENT OF MATERIAL FACTS

Church By Mail, Inc. ("Church") submits the following statements in opposition to United States' Statement of Material Facts filed with defendant's Motion for Summary Judgment. The statements are submitted pursuant to Rule 108(h) of the Rules of the District Courts of the District of Columbia and are intended to comprise a "statement of genuine issues" as required by such Rule. Church's statement is not labeled in this manner because the defendant's Statement of Material Facts do not raise material fact questions. Church has demonstrated this position by citations to the Administrative Record showing conclusively that Church's statements are uncontroverted and that there is no issue of fact to be tried. Those statements of material fact which are not contested are so identified.

To the extent defendant's statements of material fact are inconsistent with Church's statements below, the defendant's statements should be considered contested.

Where appropriate, Church has interposed its evidentiary objections to the defendant's statements and to the documents cited in the Administrative Record. Church's statements below should be considered a supplement to Church's Statement of Uncontroverted Material Facts filed with its Motion for Summary Judgment on August 26, 1988. The numbering of Church's statements below correspond to the numbering of defendant's statements in its Statement of Material Facts.

(a) *Procedural History.*

1. Not contested.

2. Not contested.

3. Not contested.

4. Not contested.

5. On August 56, 1986, the Internal Revenue Service issued a proposed ruling setting forth numerous preliminary conclusions with respect to Church's Application. (Doc. #17)

6. Church responded to the proposed ruling and requested an informal conference with the Internal Revenue Service, which was denied, but Church was granted additional time within which to submit its protest. (Doc. #18, #19)

7. Not contested.

8. Not contested.

9. Not contested.

10. Not contested.

(b) *Statement of Facts.*

1. Not contested.

2. Not contested.

3. Not contested.

4. Not contested.

5. Not contested.

6. Not contested.

7. Not contested.

8. Not contested.

9. Not contested.

10. Not contested.

11. Not contested.

12. Not contested.

13. Not contested.

14. Not contested.

15. Not contested.

16. Not contested.

17. There are no shareholders of Church and Bible Study in the Home By Mail ("CBSHM"). (Church's statement of Uncontroverted Material Facts #40. Exemption under §501(c)(3) precludes "ownership" by shareholders.)

18. Not contested.

19. Not contested.

20. All mail of Church is received at P.O. Box 3261 or Box 3321, Atlanta, Georgia. Church also maintains, but does not use, Boxes 3169, 4102 and 4574. (Doc. #14, pg. 11, ¶22).

21. Not contested.

22. Church does not operate solely through the mail. It has no facility other than administrative offices. It conducts periodic religious services through the mail and by crusades at various locations in the United States. (Church's Statement of Uncontroverted Facts #55 and #57; Doc. #14, pg. 35, ¶150 and Ex. 4(a) thereto.)

23. Church objects to the consideration of the amount of charitable donations made by it. Such facts are not relevant to any issue before the Court. (See Church's Specific Response to Defendant's Memorandum, response to page 4 thereof). Furthermore, the first sentence of the statement contradicts the second sentence, (i.e. 1% vs. "no charity.")

24. Not contested.

25. Church does not have a defined and distinct ecclesiastical government, does have ordained ministers, does not maintain established places of worship, does not offer Sunday school for the religious instruction of the young, does offer instruction to adults and children through its religious mailings, and does have a regular congregation and religious services by mail. (Church's Statement of Uncontroverted Material Facts, #52-57 and citations therein.)

26. Church has more than 33 employees. Three are officers. Four are relatives of the officers. Two of those four relatives are relatives of Reverend Ewing. Reverend McElrath has no relative who is an employee of Church. Nine employees perform clerical or maintenance work. Seven process the mail. Three do accounting or bookkeeping work and three prepare literature. (Doc. #14, pp. 14-¼6, pg. 58) [Doc. #14, pg. 46 cited by defendant does not relate to this statement]

27. Not contested.

28. Not contested.

29. Church objects to the consideration of any compensation paid by Advertising unless it is first shown that improper or unreasonable payments are made to Advertising by Church.

30. Church objects to the consideration of any compensation paid by Advertising unless it is first shown that improper or unreasonable payments are made to Advertising by Church.

31. In 1985, Reverend Ewing's son worked for Church, CBSHM and Advertising. In that same year, Reverend Ewing's daughter worked for Church and CBSHM. They earned salaries from each of the organizations as follows:

	Church	*CBSHM*	*Advertising*
Paul Ewing (son)	$ 6,125.00	$6,125.00	$48,479.00
Brenda Bofman (daughter)	$28,000.00	$7,000.00	-0-

(See Church's Statement of Uncontroverted Material Facts #29 and #28). Church objects to the consideration of any compensation paid by Advertising unless it is first shown that improper or unreasonable payments are made to Advertising by Church.

32. Church objects to the consideration of any compensation paid by Advertising unless it is first shown that improper or unreasonable payments are made to Advertising by Church.

33. Church objects to the consideration of salaries paid to Reverend Luce or his family. Such payments are not relevant to any issue before the Court. The Final ruling (Doc. #26) and the pleadings are not based on any alleged inurement to such individuals. Church

further objects to the consideration of any compensation paid by Advertising unless it is first shown that improper or unreasonable payments are made to Advertising by Church.

34. Church objects to the consideration of salaries paid to O. D. Snyder or his family. Such payments are not relevant to any issue before the Court. The Final Ruling (Doc. #26) and the pleadings are not based on any alleged inurement to such individuals, and such individuals are not officers, trustees or control persons to which inurement may be alleged. Church further objects to the consideration of any compensation paid by Advertising unless it is first shown that improper or unreasonable payments are made to Advertising by Church.

35. Church objects to the consideration of payments of rent to Mrs. Snyder. Such payments are not relevant to any issue before the Court. The Final Ruling (Doc. #26) and the pleadings are not based on any inurement to Mrs. Snyder, nor is she an officer, trustee or control person to which inurement may be alleged. (See Statement #13, above.)

36. Church objects to the consideration of any payments to Church's counsel. Such payments are not relevant to any issue before the Court. The final ruling (Doc. #26) and the pleadings are not based on any inurement or other payments to Church's counsel, nor are such payments made to any officer, trustee or control person to which inurement may be alleged. Church further objects to the consideration of such payments by Advertising unless it is first shown that improper or unreasonable payments are made to Advertising by Church. In addition, the amounts shown in Statement No. 36 are incorrect both as to amount and as to the implication that payments were made to J. C. Joyce personally. (See Church's Specific Re-

sponse to Defendant's Memorandum, response to page 34, footnote 19).

37. Church objects to the consideration of any payments made by Church to Advertising prior to July 1, 1985, the effective date of Church's application. For a response to the specific amounts alleged in this statement, see Church's Specific Response to Defendant's Memorandum, response to page 36 (first paragraph).

38. As of December 31, 1985, Church owed Advertising $1,915,231.69 as reimbursement for out-of-pocket expenses remaining unpaid as of that date. (Doc. #22, pg. 61, ¶154). [The statement that fifteen percent (15%) interest is to be paid is false and is not supported by any document cited by defendant. See Church's Statement of Uncontroverted Material Facts No. 17. See also Church's Specific Response to Defendant's Memorandum, response to page 38 (first paragraph).]

39. Not contested.

40. Advertising has little or no need for office space and its business requires relatively insignificant amounts of time. (Church's Statement of Uncontroverted Material Facts, #48).

41. Church objects to the consideration of any compensation paid by Advertising unless it is first shown that improper or unreasonable payments are made to Advertising by Church.

42. Not contested.

43. Not contested.

44. Since August 1985, Church has allowed CBSHM to use a portion of its membership list because Church could not afford to mail to its entire membership. (Doc. #14, page 39, ¶169)

45. Church and CBSHM participate in crusade costs and each advances expenses for such crusades. (Doc. #14, page 36, ¶¶151-152)

46. Church and CBSHM do not share post office boxes. (Doc. #14, page 37, ¶158; see also statement #20 above.)

47. Church maintains a financial ledger separate from CBSHM. (Doc. #24, page 2, ¶2; Doc. #27(a), pp. 2-5; Church's Statement of Uncontroverted Material Facts, #42; see also Church's Specific Response to Defendant's Memorandum, response to page 41.)

48. Not contested.

49. Advertising has extended credit to Church to the extent that money was advanced on behalf of Church prior to July 1, 1985 for printing and mailing services, for which Church intends to reimburse Advertising. (Doc. #22, pages 2-5) Since July 1, 1985, Advertising has guaranteed obligations of Church to Signal Data Processing, Inc. for past printing and mailing services. Advertising receives no compensation for such credit or guarantees. (Doc. #24, ¶¶5 and 5(a) and Exhibit "5-A" thereto.)

50. Not contested.

51. Since July 1, 1985, Advertising has paid rent, directly or indirectly, to Church and CBSHM for its minimal use of office space. From July 1, 1985 to January 1, 1986, in lieu of cash rental payments, Advertising paid $9,968.03 on behalf of Church and CBSHM for certain equipment and office expenses used almost exclusively by CBSHM and Church. (Doc. #22, pages 73 and 74, ¶¶182 and 183.)

52. Not contested.

53. Church owns one vehicle, a 1984 Blazer and leases two vehicles, a 1984 GMC Suburban and a 1984 Chevrolet box van. (Doc. #14, page 58, ¶243.)

54. Advertising leases three Rolls Royce automobiles for its advertising image and client entertainment. On the rare occasion when these automobiles are driven, they are driven by clients of Advertising or by Reverends Ewing or McElrath in connection with entertainment of Advertising's clients. (Doc. #14, pages 58-60, ¶¶243 and 244.) [Church objects to the consideration of ownership or leasing of any vehicles by Advertising. Such facts are not relevant to any issue before the Court.]

55. CBSHM provides a vehicle to Reverend Luce for his use for Church business. That vehicle is also used during working hours by numerous hourly employees working under Reverend Luce's supervision. (Doc. #14, page 58-59, ¶243.) [Church objects to the consideration of the fact that a vehicle is provided by anyone to Reverend Luce. Such fact is not relevant to any issue before the Court. The Final Ruling (Doc. #26) and the pleadings are not based on any alleged inurement to such individual.]

56. Church objects to the consideration of the fact that Reverend Ewing owned a Maserati personally unless it is shown that the vehicle was provided directly or indirectly by Church.

57. Church objects to the consideration of the fact that Reverend McElrath owned vehicles personally unless it can be shown that such vehicles were provided directly or indirectly by Church.

58. Not contested.

59. Not contested.

60. Church's 1984 tax return was prepared by the accounting firm of Coopers & Lybrand in Tulsa, Oklahoma. (Doc. #14, Exhibit "38," page 3 [this document is numbered by the IRS in the Administrative Record as Exhibit "25-8"].) A portion of the accounts payable

on Schedule L, line 15, was reclassified as "other current liabilities due to Twentieth Century Adv." and moved to line 17. (Doc. #14, Exhibit "38" [IRS numbered "25-8," page 15]); see also Church's Specific Response to Defendant's Memorandum, response to page 38 (middle paragraph).)

BLACKSTOCK JOYCE POLLARD
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ATTORNEYS FOR PLAINTIFF

EXHIBIT "D"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 87-0754-LFO

CHURCH BY MAIL, INC.,

Plaintiff,

v.

UNITED STATES, *et al.*,

Defendants.

UNITED STATES' STATEMENT OF GENUINE ISSUES

IN ACCORDANCE WITH Local Rule 108(h), defendant United States of America, by and through its attorneys, hereby submits a statement of material facts bearing on this lawsuit as to which defendant contends there exist genuine issues precluding summary judgment in favor of plaintiff.

1. The name defendant in plaintiff's suit for a declaratory judgment is the Commissioner of Internal Revenue, over which this Court lacks jurisdiction.

2. Plaintiff is not operated exclusively for exempt purposes as required by 26 U.S.C., Sec. 501(c)(3).

3. Payments by plaintiff to Twentieth Century Advertising for amounts owed for a period when plaintiff was not an exempt organization and when the relationship was a cause for the loss of plaintiff's exemption constitute a diversion of charitable assets and a prohibited inurement.

4. Plaintiff has failed to establish that it does not serve the private interests of the Rev. Ewing, the Rev. McElrath, and/or their families.

5. Plaintiff has failed to establish that its earnings do not inure to the benefit of the Rev. Ewing, the Rev. McElrath, and/or their families, through excessive payments for private purposes.

6. Plaintiff has failed to establish that it does not serve the private interests of Twentieth Century Advertising, a private, for-profit entity, by subsidizing its operations through shared offices, expenses, and personnel.

7. Since July 1, 1985, Rev. Ewing, the Rev. McElrath, and their families have received benefits from plaintiff other than reasonable compensation for services rendered.

8. Plaintiff provides fringe benefits to the Rev. Ewing, the Rev. McElrath, and their families in addition to and other than medical benefits policies and reimbursements.

9. Non-business meals are provided by plaintiff to the Rev. Ewing, the Rev. McElrath, and their families.

10. Cleaning and other related non-business services are provided by plaintiff to the Rev. Ewing, the Rev. McElrath, and their families.

11. The reasonableness of the compensation paid to the Rev. Ewing, the Rev. McElrath, and their families is questionable when compared to the compensation paid to persons on other jobs performing comparable duties and obtaining comparable results.

12. The remaining relationship between Twentieth Century Advertising and plaintiff is far more extensive than one of a mere creditor to a debtor.

13. Plaintiff has failed to establish that it does not carry out non-exempt purposes and activities which are not more than insubstantial.

14. Even if plaintiff were an organization of the type described in 26 U.S.C., Sec. 501(c)(3), plaintiff is not a church for purposes of 26 U.S.C., Secs. 509(a)(1) and

170(b)(1)(A)(i) because: a) it does not have an established place of worship; b) it does not conduct regular religious services; c) it does not have a regular congregation fulfilling an associational role; d) some of its adherents are affiliated with churches in addition to their affiliation with plaintiff; e) it does not perform sacerdotal functions on a regular basis or otherwise; and f) it does not have ordained ministers ministering to a congregation.

DATE: September 27, 1988.

Respectfully submitted,

/s/ Michael J. Salem
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OF COUNSEL:

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Church By Mail Inc.
4270 Promenade Way
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Marina del Rey CA, 90292

Refer Reply to: OP:E:EO:R:2

Date: 21 JAN 1987

Employer Identification Number: 58-1385481
Form: 1120
Tax Years: 1985 and Subsequent years

Dear Applicant:

This is a final ruling as to your exempt status under section 501(c)(3) of the Internal Revenue Code from July 1, 1985.

This ruling is made for the following reason(s): You are not operated exclusively for exempt purposes as required by section 501(c)(3). Your payments to Twentieth Century Advertising for amounts owed for a period when you were not exempt and when the relationship was a cause of the loss of exemption constitute a diversion of charitable assets and prohibited inurement. Furthermore, you have failed to establish that you do not serve the private interests of Rev. Ewing and Rev. McElrath and their families, that your earnings do not inure to the benefit of these individuals and their families through excessive payments for private purposes, that you dc not serve the private interests of Twentieth Century Advertising, a private for-profit organization, by subsidizing its operations through shared offices and expenses. Finally, even if you were described in section 501(c)(3), you are not a church for purposes of section 509(a)(1) and section 170(b)(1)(A)(i) because you do not have an established place of worship, you do not con-

duct regular religious services, you do not have a regular congregation fulfilling an associational role, some of your adherents are affiliated with other churches and you do not perform sacerdotal functions regularly for a congregation nor do you have ordained ministers ministering to a congregation.

Contributions to your organization are not deductible under Code section 170.

You are required to file federal income tax returns on the above form. Based on the financial information you furnished, it appears that returns should be filed for the tax years shown above. You should file these returns with your key District Director for exempt organization matters within 30 days from the date of this letter, unless a request for an extension of time is granted. Returns for later tax years should be filed with the appropriate services center as indicated in the instructions for those returns.

If you decide to contest this ruling under the declaratory judgment provisions of section 7428 of the Code, you must initiate a suit in the United States Tax Court, the United States Claims Court, or the District Court of the United States for the District of Columbia before the 91st day after the date that this ruling was mailed to you. Contact the clerk of the appropriate court for rules for initiating suits for declaratory judgment. Processing of income tax returns and assessment of any taxes due will not be delayed because a declaratory judgment suit has been filed under Code section 7428.

In accordance with section 6104(c) of the Code, the appropriate State officials will be notified of this action.

If you have any questions about this ruling, please contact the person whose name and telephone number are shown above.

Sincerely yours,

(signed) Milton Cerny

John F. Kelly
Chief, Exempt Organizations
Conference and Review Branch

TITLE 28
JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 85—DISTRICT COURTS; JURISDICTION

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

* * *

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740,, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445.

§ 7428. Declaratory judgments relating to status and classification of organizations under section 501(c)(3), etc.

(a) Creation of remedy.—In a case of actual controversy involving—

(1) a determination by the Secretary—

(A) with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) which is exempt from tax under section 501(a) or as an organization described in section 170(c)(3),

(B) with respect to the initial classification or continuing classification of an organization as a private operating foundation (as defined in section 4942(j)(3)), or

(2) a failure by the Secretary to make a determination with respect to an issue referred to in paragraph (1),

upon the filing of an appropriate pleading, the United States Tax Court, the United States Claims Court, or the district court of the United States for the District of Columbia may make a declaration with respect to such initial qualification or continuing qualification or with respect to such initial classification or continuing classification. Any such declaration shall have the force and effect of a decision of the Tax Court or a final judgment or decree of the district court or the Claims Court, as the case may be, and shall be reviewable as such. For purposes of this section, a determination with respect to a continuing qualification or continuing classification includes any revocation of or other change in a qualification or classification.

(b) Limitations.—

(1) Petitioner.—A pleading may be filed under this section only by the organization the qualification or classification of which is at issue.

(2) Exhaustion of administrative remedies.—A declaratory judgment or decree under this section shall not be issued in any proceeding unless the Tax Court, the Claims Court, or the district court of the United States for the District of Columbia determines that the organization involved has exhausted administrative remedies available to it within the Internal Revenue Service. An organization requesting the determination of an issue referred to in subsection (a)(1) shall be deemed to have exhausted its administrative remedies with respect to a failure by the Secretary to make a determination with respect to such issue at the expiration of 270 days after the date on which the request for such determination was made if the organization has taken, in a timely manner, all reasonable steps to secure such determination.

(3) Time for bringing action.—If the Secretary sends by certified or registered mail notice of his determination with respect to an issue referred to in subsection (a)(1) to the organization referred to in paragraph (1), no proceeding may be initiated under this section by such organization unless the pleading is filed before the 91st day after the date of such mailing.

(c) Validation of certain contributions made during pendency of proceedings.—

(1) In general.—If—

(A) the issue referred to in subsection (a)(1) involves the revocation of a determination that the organization is described in section 170(c)(2),

(B) a proceeding under this section is initiated within the time provided by subsection (b)(3), and

(C) either—

(i) a decision of the Tax Court has become final (within the meaning of section 7481), or

(ii) a judgment of the district court of the United States for the District of Columbia has been entered, or

(iii) a judgment of the Claims Court has been entered,

and such decision or judgment, as the case may be, determines that the organization was not described in section 170(c)(2),

then, notwithstanding such decision or judgment, such organization shall be treated as having been described in section 170(c)(2) for purposes of section 170 for the period beginning on the date on which the notice of the revocation was published and ending on the date on which the court first determined in such proceeding that the organization was not described in section 170(c)(2).

(2) **Limitation.**—Paragraph (1) shall apply only—

(A) with respect to individuals, and only to the extent that the aggregate of the contributions made by any individual to or for the use of the organization during the period specified in paragraph (1) does not exceed $1,000 (for this purpose treating a husband and wife as one contributor), and

(B) with respect to organizations described in section 170(c)(2) which are exempt from tax under section 501(a) (for this purpose excluding any such organization with respect to which there is pending a proceeding to revoke the determination under section 170(c)(2)).

(3) **Exception.**—This subsection shall not apply to any individual who was responsible, in whole or in part, for the activities (or failures to act) on the part of the organization which were the basis for the revocation.

(d) Subpoena power for district court for District of Columbia.—In any action brought under this section in the district court of the United States for the District of Columbia, a subpoena requiring the attendance of a witness at a trial or hearing may be served at any place in the United States.

Added Pub.L. 94-455, Title XIII, § 1306(a), Oct. 4, 1976, 90 Stat. 1717, and amended Pub.L. 94-600, Title VII, § 701(dd)(2), Nov. 6, 1978, 92 Stat. 2924; Pub.L. 97-164, Title I, § 152, Apr. 2, 1982, 96 Stat. 46; Pub.L. 98-369, Div. A, Title X, § 1033(b), July 18, 1984, 98 Stat. 1039.)